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No. 91-34

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in upholding the interpretation by the United States Department of the Interior of the statute of limitations provision contained in Section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339. Specifically, whether the Court of Appeals erred by casting aside this Court's longstanding presumption that, in the absence of a clear statutory statement to the contrary, a limitations period should be construed to begin to run no earlier than when the right of action subject to the statutory bar has accrued.

LIST OF PARTIES

The list of parties required by Rule 14.1(b) and the statement required by Rule 29.1 are included in Appendix G to this Petition. App. 98a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. Petitioners note that a petition for review of that same judgment was filed with the Court by Phillips Petroleum Co., Chevron U.S.A. Inc., and Conoco Inc. on June 28, 1991 and docketed as number 91-1.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830 (Fed. Cir. 1991) (App. 1a-8a). The opinion of the United

States Claims Court in this case is reported at *Chevron U.S.A., Inc. v. United States*, 17 Cl. Ct. 537 (1989) (App. 13a-24a). The opinion of the United States Department of the Interior Board of Land Appeals is reported at *Shell Offshore, Inc.*, 96 I.B.L.A. 149 (1987) (App. 25a-51a). The decision of the Minerals Management Service is reported at 49 Fed. Reg. 47,120 (Nov. 30, 1984) (App. 64a-67a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1991. App. 9a. A timely petition for rehearing was denied on April 4, 1991, App. 10a, and a suggestion for rehearing *en banc* was denied on April 17, 1991. App. 12a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

This case requires the interpretation of Section 10 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1339 (1988). No regulations have been issued regarding Section 10. *See Shell Offshore, Inc.*, App. 45a-46a. The text of the section is as follows:

> 43 U.S.C. § 1339. Refunds; filing time limitation; certification of repayment; necessity of report to Congress
>
> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make

such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.

(b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: Provided, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress.

STATEMENT

The question is whether the two-year limitations period set forth in Section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339, begins to run against claimants before their rights to make claims accrue. Section 10 governs claims for refunds sought from the United States Department of the Interior ("Interior Department") for overpayments, including royalty overpayments, to the Interior Department by lessees under oil and gas leases of submerged lands located on the Outer Continental Shelf ("OCS"). Monthly royalty payments are required of lessees under each of the approximately 6500 federal OCS leases, of which some 1600 are currently productive oil and gas leases.[1] These compose a major federal revenue source, producing over $1.3 bil-

[1] United States Minerals Management Service, "Mineral Revenues 1989," at 23 (U.S. Government Printing Office, 1990).

lion in gas royalty and $800 million in oil royalty in 1989 alone.[2]

This issue of statutory construction arises because of claims submitted by the Petitioners to the Interior Department for refund of royalty overpayments for gas produced and sold from OCS leases. Petitioners' royalty payments were equal to a percentage, as specified in their lease agreements, of their gross proceeds received from the sale of the gas produced from OCS leases. In the circumstances presented here, Petitioners received the applicable maximum lawful regulated prices established by the Federal Energy Regulatory Commission ("FERC"), and paid royalties based on these ceiling prices. As the United States stipulated below, these payments were, when made, in the amount then lawfully required by the Interior Department. App. 95a. Later, however, a court decision vacated the FERC ceiling prices on which Petitioners' royalty payments were based, and rendered the payments excessive. *See Interstate Natural Gas Ass'n v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (*"INGAA"*). The question presented is whether the two-year limitations period commences to run when royalties are paid even where, as here, the royalties were in the lawful amount when paid and no right to refunds arose until *INGAA* was handed down.

The Interior Department denied Petitioners' refund claims, filed within two years of the issuance of the court decision in *INGAA*, because they were filed more than two years after Petitioners had paid their royalties. App. 41a. The United States Claims Court reversed, holding that the two-year limitation period did not begin to run until the issuance of *INGAA*, and that Petitioners' refund requests were therefore timely. App. 24a.

The United States Court of Appeals for the Federal Circuit reversed the Claims Court and reinstated the In-

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[2] *Id.* at 8.

terior Department's denial of Petitioners' refund requests. App. 8a. The Court of Appeals concluded that the Interior Department's construction of the limitations period of OCSLA Section 10, as commencing at the time Petitioners paid their royalties, is reasonable. If left in place, the decision of the Court of Appeals not only would establish a limitations period that can run before the rights subject to the statutory bar have accrued, but also would cause severe administrative burdens by forcing lessees to file protective refund claims contingent on the occurrence of possible—and even unlikely—future events. The effect would be a flood of protective refund claims, most of which would be proved unnecessary by subsequent events, and a bar against the otherwise meritorious refund claims of those lessees lacking perfect foresight of all future events that may cause their payments, in the lawful amounts when made, to become retroactively excessive.

A. Royalty Regulation.

The Minerals Management Service of the United States Department of the Interior ("MMS") leases submerged federal lands on the OCS, and collects from lessees royalties in an amount no less than 12½ percent of the "amount or value of the production saved, removed, or sold." 43 U.S.C. § 1337(a)(1)(A) (1988).[3] Petitioners are such lessees.

At all relevant times, the MMS equated the value of gas for royalty purposes to the applicable gas ceiling prices whenever the ceiling prices were collected by producers in the sale of gas produced from a federal lease.[4]

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[3] 30 C.F.R. § 201.100 (1990); 30 C.F.R. § 250.4 (1990) (delegating authority over royalty and leasing programs to the Director of the MMS).

[4] App. 96a-97a. This is an application of the general royalty standard of the MMS that royalty is due in an amount no less than 12½ percent of the "gross proceeds" received by the lessee in the sale of gas. *See* 30 C.F.R. § 206.152(b)(1)(i) (1990). The predecessor of this regulation also tied royalties to the "gross proceeds" of the lessee. 30 C.F.R. §§ 221.46 and 221.47 (1978).

For this reason, a change in the applicable ceiling prices necessarily caused a correlative change in the amount of royalty lawfully required by the MMS from producers collecting the ceiling prices.

B. Ceiling Price Regulation.

The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301 *et seq.* (1988), authorizes the Federal Energy Regulatory Commission to fix and enforce natural gas ceiling prices, which the NGPA expresses as a price per million British thermal units (Btu's). 15 U.S.C. §§ 3301-3309, 3411. The retroactive invalidation of a FERC rule relating to the method of measuring gas for purposes of implementing NGPA ceiling prices gave rise to this case.

Before passage of the NGPA, the Federal Power Commission ("FPC"), FERC's predecessor, had established and enforced natural gas ceiling prices under authority established in the Natural Gas Act. 15 U.S.C. § 717, *et seq.* (1988). For ceiling price purposes, the FPC required use of a gas measurement method that assumes that the gas is saturated with water. This so-called "wet" measurement rule understated the actual energy content (Btu content) of a given volume of gas because gas, as actually produced, contains less water than the theoretical saturated condition.

The NGPA became effective on December 1, 1978. To implement NGPA ceiling prices, the FERC established, in its Order Nos. 93 and 93-A, the so-called "dry" or "as-delivered" basis for gas measurement.[5] By this rule, the ceiling price for gas was applied to the actual energy (Btu) content of gas delivered and sold to a purchaser. Because of the elimination of the assumption that gas is

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[5] Order No. 93, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1977-1981] (CCH) ¶ 30,172 (1980), 45 Fed. Reg. 49,077 (July 23, 1980); *rehearing denied*, Order No. 93-A, 15 F.E.R.C. (CCH) ¶ 61,075 (1981), 46 Fed. Reg. 24,537 (May 1, 1981).

saturated with water vapor, the applicable ceiling price for a given volume of gas measured under the dry rule was greater than if the gas were measured under the "wet" rule. The United States has stipulated that during the time when Order Nos. 93 and 93-A were in effect, the Petitioners could lawfully collect the ceiling prices determined under the dry rule announced in those Orders. App. 94a-95a.

On August 9, 1983, in *INGAA*, the Court of Appeals for the District of Columbia Circuit held that the FERC lacked authority to adopt the dry rule and directed the FERC to reinstate the wet rule. Petitions for a writ of certiorari to this Court were denied on March 19, 1984. 465 U.S. 1108 (1984).

The effect of *INGAA* was to reduce retroactively the applicable ceiling prices collected by Petitioners and producers. The FERC responded to the court's action by directing producers to recompute the applicable ceiling prices for all gas sold since December 1, 1978, using the wet rule and to refund to gas purchasers the resulting price differential. Producers were made liable for refunds attributable to all gas they had sold, including the share attributable to royalty interests.[6] Each producer was left to seek reimbursement from royalty owners, including the MMS, for all refund payments attributable to the royalty share of the monies collected by producers under the dry rule.

C. Proceedings Before The Department Of The Interior.

Following the decision in *INGAA*, lessees that had paid royalties to the MMS attempted to recover the overpayments arising from the reversal of the Order Nos. 93 and 93-A ceiling prices. The Associate Director for Royalty Management of the MMS, by letter dated November 9, 1983, announced to lessees that no claims for royalty

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[6] Order No. 399, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1982-1985] (CCH) ¶ 30,597 (1984), 49 Fed. Reg. 37,735 (Sept. 26, 1984).

refunds would be accepted until this Court had acted on the petitions for certiorari in *INGAA*.[7]

After denial of petitions for a writ of certiorari in *INGAA*, the MMS published procedures for seeking refunds. At first, these procedures included the requirement that payors submit "information showing that the payment for which a refund or credit is sought was made within 2 years of the request."[8] The MMS revised these procedures on August 8, 1984. In this revised notice the MMS stated that "the 2-year statute of limitations mandated in section 10 of [the OCSLA] was tolled for all payors on November 9, 1983" by the letter of the Associate Director mentioned above.[9] Subsequently, the MMS summarily denied "all FERC Orders 93/93-A refund requests which seek refunds of royalty payments made before November 9, 1981, on federal Outer Continental Shelf (OCS) leases", unless prior to November 9, 1983, the lessee had filed a protective refund request contingent on the final outcome of *INGAA*.[10]

The Petitioners and other producers appealed these denials to the Interior Board of Land Appeals (IBLA), but the IBLA upheld the MMS' interpretation of Section 10. *Shell Offshore, Inc.*, 96 I.B.L.A. 149 (1987), App. 25a. Specifically, the IBLA concluded that the two-year limitations period begins to run at the time royalties are paid, even though this time does not "necessarily coincide[] with the event by which a right to a refund accrues." App. 39a. The IBLA conceded that OCSLA Section 10 was modelled on an earlier statute of limitations

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[7] Letter from Robert E. Boldt, MMS Associate Director for Royalty Management, to Payors (Nov. 9, 1983). App. 56a.

[8] "Refund Procedures," 49 Fed. Reg. 17,824 (April 25, 1984). App. 57a.

[9] "Refund Procedures and Order to Pay Royalties," 49 Fed. Reg. 31,779 (Aug. 8, 1984). App. 60a.

[10] "Final Order on Royalty Refund Requests Resulting from FERC Order 93 and 93-A," 49 Fed. Reg. 47,120 (Nov. 30, 1984). App. 64a.

that began to run only when the right to make a claim subject to the bar accrued, and further acknowledged that the legislative history does not disclose an intent to alter this result. App. 39a. Nonetheless, relying solely on the statutory phrase "within two years after the making of the payment," in isolation from the preceding reference in the same sentence to the making of "a payment . . . in excess of the amount . . . lawfully required," the IBLA concluded that the limitations period began to run at the time of payment. App. 40a-41a.

On April 21, 1987, the IBLA denied a motion filed by the MMS for clarification of IBLA's decision. *Shell Offshore Inc., et al.*, "Order," IBLA 85-282 thru 85-297 (April 21, 1987), App. 52a. The MMS had requested that the IBLA "clarify" that, contrary to the IBLA's express finding (App. 49a-50a), the November 9, 1983 letter had not instructed lessees to withhold refund requests until the *INGAA* decision had become final. The IBLA denied this motion, stating:

> the plain import of [the letter] is that MMS did not wish producers to claim refunds until after the litigation was ended and refund procedures were established by the MMS.

App. 53a.

D. Court Proceedings Below.

Petitioners and other lessees sought review of the IBLA's decision in the United States Claims Court.[11] On July 24, 1989, the Claims Court reversed the IBLA. *Chevron U.S.A., Inc. v. United States*, 17 Cl. Ct. 537 (1989), App. 13a-24a. The Claims Court held that the two-year limitations period in OCSLA Section 10 began

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[11] The complaints were filed in the Claims Court, rather than the United States District Court, because the Fifth Circuit had held in *Amoco Production Co. v. Hodel*, 815 F.2d 352 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988), that the Claims Court had *exclusive* jurisdiction over cases in which a refund of a royalty overpayment is sought.

to run against Petitioners' claims for refunds no earlier than when Petitioners' royalty payments became in excess of the amount lawfully required by the MMS by reason of the court decision in *INGAA*. Applying the presumption of statutory construction articulated by this Court in *United States v. Wurts*, 303 U.S. 414, 418 (1938), that statutes of limitation begin to run only when the rights subject to their bar have accrued, the Claims Court determined that Section 10 should be interpreted to have commenced to run against Petitioners' claims for refunds only when *INGAA* was handed down because it was at that time that Petitioners' right to refunds came into existence. App. 20a-22a. In reaching this conclusion, the Claims Court read "payment" in the statutory phrase "within two years after the making of the payment" as referring to an *excess* payment. App. 19a. The Claims Court therefore interpreted the statute to begin to run only when there were excess payments and Petitioners' right to refunds of the excess payments had accrued. As the Claims Court noted:

> Statutes of limitations have the purpose of barring stale claims; they do not serve to preclude claims that have not yet come into existence. [The Interior Department's] position would allow the statute of limitations to run and expire before any cause of action had accrued. Such a result is unreasonable and without judicial support.

App. 22a. The Claims Court found nothing in either the language of OCSLA Section 10 or its legislative history to overcome the *Wurts* presumption.[12]

The United States Court of Appeals for the Federal Circuit reversed the Claims Court's decision and remanded. App. 8a. The Court did not dispute the Claims

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[12] Because the Claims Court's decision addressed only the issue of liability, the Petitioners and the United States subsequently filed a Stipulation of Quantum to fix the amount of the Government's liability. App. 90a.

Court's conclusion that the phrase "making of the payment" in OCSLA Section 10 was intended to refer "to the making of an excess payment." App. 6a. Nevertheless, the Court of Appeals upheld the IBLA's interpretation of OCSLA Section 10, concluding that the Petitioners' refund requests were barred because they were not filed within two years of the time Petitioners made their royalty payments. App. 6a. The Court of Appeals reasoned that Petitioners' royalty payments were excessive when made because "[t]he *INGAA* ruling did not render the royalties excessive, but merely confirmed that fact." App. 6a. On this basis, the Court of Appeals concluded that Petitioners' claims for refunds accrued on the date the royalty payments were made. App. 6a-7a. Further, the Court of Appeals concluded that the statute commenced to run on the date of payment because Petitioners then knew that the FERC's dry rule would be challenged and, if the challenges were successful, "could" result in a reduction in the ceiling prices and a change in the amount of royalty owed. App. 7a.

The Court of Appeals denied rehearing, and denied a suggestion for rehearing *en banc*. App. 10a and 12a.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the interpretation of statutes of limitation.

Limitation provisions exist to bar stale claims by those who slept on their rights, not claims that have not yet arisen. Over fifty years ago, therefore, this Court recognized a fundamental rule of interpretation of such statutes that, in the absence "of language so clear as to leave room for no other reasonable construction," a limitations period begins to run only when the rights subject to it have accrued. *United States v. Wurts*, 303 U.S. 414, 418 (1938); *see also Woods v. Stone*, 333 U.S. 472, 476-77 (1948). By upholding the Interior Department's interpretation of OCSLA Section 10, the Court of Appeals

decision has cast aside this longstanding presumption and placed itself in conflict in principle not only with *Wurts*, but also with decisions of the other Courts of Appeal—decisions that consistently follow this fundamental rule of construction.

The Circuit Court has also placed itself in conflict in principle with decisions of this Court that have disapproved statutory interpretations by administrative agencies running counter to longstanding presumptions for the interpretation of statutes. Such agency interpretations have been held unreasonable and rejected by this Court, even though they are otherwise permissible readings of the statutory text and legislative history, in the absence of a clear legislative statement that overcomes the applicable presumption. *See, e.g., EEOC v. Arabian American Oil Co.*, —— U.S. ——, 111 S. Ct. 1227, 1235-36 (1991). In upholding the Interior Department's interpretation of Section 10, the Court of Appeals extended unwarranted deference to the agency's interpretation because there is no clear statement in the statutory language or legislative history demonstrating an intent to depart from the general rule that statutes of limitation begin to run when a claimant's rights accrue.

If allowed to stand, the Court of Appeals' decision will have a substantial adverse impact on the administration of, and on compliance with, the required monthly royalty payments on each of the productive oil and gas leases located in the OCS. To protect their rights to refunds, Petitioners and other lessees will be burdened with the constant obligation to survey the full range of possible future statutory and regulatory changes that *may* be adopted by the courts, Congress or administrative agencies, and that *may* have a retroactive impact on the amount of royalty lawfully required, and will be subject to the continuing necessity of submitting protective refund requests contingent on the occurrence of such changes. There is nothing in the language of OSCLA Section 10, or in its legislative history, which suggests

that Congress intended to impose this burden on lessees or to establish a limitations period that may operate to bar meritorious refund claims before the rights on which they are based have accrued.

I. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE LONGSTANDING PRESUMPTION THAT STATUTES OF LIMITATION BEGIN TO RUN WHEN THE CLAIMS SUBJECT TO THE STATUTORY BAR HAVE ACCRUED.

The decision of the Court of Appeals is directly counter to this Court's unequivocal presumption that, in the absence of "language so clear as to leave room for no other reasonable construction," a limitations period should be interpreted as beginning to run only when the rights on which it is based have accrued. *United States v. Wurts*, 303 U.S. 414, 418 (1938); *see also Woods v. Stone*, 333 U.S. 472, 476-77 (1948). There is nothing in either the statutory text or the legislative history that overcomes this well-founded presumption.

The text of OCSLA Section 10 unambiguously provides that the two-year limitations period begins to run when a payment becomes in excess of the amount lawfully required. Section 10 expressly addresses circumstances where a lessee "has made a payment . . . in excess of the amount he was lawfully required to pay", and provides that "such excess shall be repaid" when a "request for repayment of such excess is filed . . . within two years after the making of the payment." [13] As the Claims Court found, and as the Court of Appeals could not dispute, the phrase "within two years after the making of the payment" refers to the making of an *excess* payment. App. 19a and 6a. Unless and until a royalty payment becomes "*in excess* of the amount he was lawfully required to pay" the lessee has no right to demand or to receive a "repay-

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[13] 43 U.S.C. § 1339(a).

ment" or refund.[14] Accordingly, the plain words of the statute establish an express and commonsense predicate to the right to a refund and to the running of the statute, namely, that the "payment" be in excess of the amount that "was lawfully required."

This language is fully congruent with the presumption that statutes of limitation begin to run when the rights subject to the bar have accrued. It is the existence of an excess payment that is the condition precedent to the accrual of a right to a refund, and to the start of the running of the limitations period. A "payment" is a necessary but not a sufficient condition. All events must also occur that render the payment an "excess payment." Where, as here, a payment is in the amount lawfully required when made, but becomes "excessive" by reason of subsequent events, the limitations period does not begin to run until those events occur.

The legislative history further demonstrates that Congress had no intent to depart from the general rule governing the operation of statutes of limitation. There is no dispute that Section 10 was modeled on the limitations provision of a 1919 onshore lands leasing statute,[15] which

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[14] *Id.* (emphasis added).

[15] Shell Offshore, Inc. App. 37a-38a. *See Outer Continental Shelf: Hearings on S.1901 Before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 1st Sess., 638-39 (1953) ("It is sections 95 to 98(a) of title 43 of the code, from which section 10 of [OCSLA] . . . was taken . . ." (statement of Assistant Solicitor Edelstein)). This predecessor statute read in pertinent part: "That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws *in excess of the amount he was lawfully required to pay* under such laws, such excess shall be repaid to such person or to his legal representatives: Provided, That such person or his legal representative *shall file a request for the repayment of such excess within two years after the patent has issued* for the land embraced in such payment, or within two years from the passage of this Act as to such excess payments as have heretofore been made." Act of Dec. 11, 1919,

was made applicable to mineral leases in 1930.[16] Nor is there dispute that, before OCSLA was enacted, this earlier statute was definitively construed on this precise point by the Comptroller General at the request of the Secretary of the Interior.[17] Specifically, the Secretary inquired whether the two-year period in the 1919 Act would begin to run on a claim for a refund of a payment at the time the payment was made, even though the right to claim a refund did not accrue until the occurrence of a subsequent event. The Comptroller General first observed:

> It is a general rule of statutory construction that a statute of limitation begins to run from the time the right of action which it covers accrues; and that when such right depends upon the happening of an event or contingency, the statute does not begin to run until the happening of such event or contingency.[18]

The Comptroller General concluded that where a "payment when made was as required by law but by reason of some subsequent contingency it became in excess of that required by law," then "the right to refund does not arise until the happening of [the] contingency" and "the

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ch. 5, 41 Stat. 366 (formerly codified at 43 U.S.C. § 96), *repealed by* Pub. L. No. 86-649, § 204(b), 74 Stat. 506, 507 (1960) (emphasis added).

[16] Act of June 27, 1930, ch. 642, 46 Stat. 822 (formerly codified at 43 U.S.C. § 98a), *repealed by* Pub. L. No. 86-649, § 204, 74 Stat. 506, 507 (1960).

[17] Opinion B-7631, 20 Comp. Gen. 734 (1941). App. 79a. The Comptroller General is statutorily charged with authority over disbursements of funds by executive agencies. 31 U.S.C. § 3529 (1988). In exercising that authority, the Comptroller General may issue authoritative interpretations of statutory provisions related to disbursement of federal funds. *See United States v. Bergh*, 352 U.S. 40, 46-47 (1956) (statutory interpretation of the Comptroller General "must be given great weight").

[18] 20 Comp. Gen. 738. App. 88a.

two-year period of limitation would begin to run from the date of such happening." [19]

As the Claims Court correctly concluded, when Congress modeled OCSLA Section 10 on the 1919 Act, "[n]owhere in the legislative history did Congress even hint that the statute should be changed from an accrual statute to a bar to claims that had yet to come into existence . . . ." App. 20a-21a. Indeed, the only evidence in the legislative history suggests that Congress intended "no change in substance" when incorporating the two-year period into the OCSLA.[20] Under the 1919 Act a refund request had to be filed within "two years after the [land] patent is issued." This language was changed to "two years after making of the payment" in the OCSLA. However, as the IBLA itself acknowledged, "a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing". App. 39a.

Congress having made no clear statement evincing an intent to establish a limitations period that can begin to run before a claimant's rights have accrued, there is no basis on which to sustain the decision of the Court of Appeals. The decision conflicts in principle with fundamental precedent of this Court,[21] as well as with the decisions of the other courts of appeal.[22] As the Fifth

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[19] *Id.* at 739, App. 89a.

[20] *Outer Continental Shelf: Hearings on S.1901 Before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 1st Sess. 638 (1953) (Statement of Department of the Interior Assistant Solicitor Edelstein).

[21] *United States v. Wurts*, 303 U.S. 414, 418 (1938); *Woods v. Stone*, 333 U.S. 472, 476-77 (1948). As early as 1887, this Court held that a statute of limitations does not run until a claimant has an enforceable claim. *United States v. Louisiana*, 123 U.S. 32, 37 (1887).

[22] *See, e.g., Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105, 108 (3rd Cir. 1983); *Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d

Circuit succinctly summarized the applicable rule of construction, "[i]t is axiomatic that before a statute of limitations can begin to run there must be a right of action on which it is to run." [23] Accordingly, a statute of limitations begins to run when all events have occurred that provide to a claimant an enforceable right that can be prosecuted to a conclusion.[24]

Contrary to the suggestion of the Court of Appeals, App. 7a-8a, the opportunity to file protective refund requests before a right to claim a refund accrues does not sustain the Interior Department's departure from this presumptive rule of construction. Until a claimant has rights to protect, and some opportunity to protect them, the presumptive rule of interpretation relating to statutes of limitation holds that such statutes do not run against claims arising from those rights. As the Claims Court observed, statutes of limitation are intended to bar the stale claims of those who have slept on their rights, not to bar claims that have not yet come into existence. App. 22a. Claimants may be *permitted* to file protective claims before their rights accrue, but statutes of limitation are presumed to *require* no such filings. This Court itself has observed that such protective filings "would be a sheer formality" and simply "would remain quiescent" until the accrual of the rights at issue, and that a requirement to make such filings in order to avoid

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259, 261 (7th Cir. 1982); *Equilease Corp. v. State Federal S&L Ass'n*, 647 F.2d 1069, 1073 (10th Cir. 1981).

[23] *Dore v. Kleppe*, 522 F.2d 1369, 1373 (5th Cir. 1975) (quoting *United States v. First National Bank*, 441 F.2d 906, 909 n.1 (5th Cir. 1971)); *see also United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972).

[24] *See Baron v. Allied Artists Pictures Corp.*, 717 F.2d at 108; *see also Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981).

a statutory bar would create a senseless "procedural trap for the unwary." [25]

Indeed, statutes which begin to run from an event other than the accrual of an action or a claim, or when that accrual is unascertainable, are more properly known as statutes of repose. " 'Statutes of limitation' extinguish, after [a] period of time, [the] right to prosecute [an] accrued cause of action; [a] 'statute of repose,' by contrast, limits potential liability by limiting [the] time during which [a] cause of action can arise." BLACK'S LAW DICTIONARY 1411 (6th ed. 1991); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 59 U.S.L.W. 4687, 4690 (U.S., June 18, 1991). Examples of statutes of repose are to be found in various state enactments which terminate architects' and engineers' malpractice liability at the conclusion of some specified term after a building is opened to the public, or a manufacturer's product liability at a fixed time after his product is first sold. *See, e.g., Hartford Fire Ins. v. Lawrence, Dykes, Goodenberger*, 740 F.2d 1362 (6th Cir. 1984) (architects and engineers), *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986) (product liability). Typically, statutes of repose are enacted as supplements to statutes of limitation in order to accomplish a clearly expressed legislative intent and purpose, and run for more lengthy terms. *See, e.g.*, Md. Cts. & Jud. Proc. Code Ann. § 5-108 (1980) (20 year repose period governing unsafe property and 10 year repose period governing architect, engineer, or contractor liability).

The effect of the decision of the Court of Appeals in this case is the conversion of a garden-variety statute of limitations, which runs to bar the action on a refund claim, into a two-year statute of repose, which may commence to run before any right of action on the claim accrues, and which—because of its extreme brevity—may

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[25] *Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967).

run in full before the right of action accrues at all. Nothing in the statutory language or legislative history of Section 10 indicates that Congress intended such a result.

The effort of the Court of Appeals to reconcile its decision with this substantial body of precedent is sustained neither by logic nor by the record in this case. The Court of Appeals asserts that "[t]he *INGAA* ruling did not render the royalties excessive, but merely confirmed that fact." App. 6a. Based on this premise, the Court of Appeals concludes that Petitioners' rights to refunds accrued at the time the royalty payments were made, not later when *INGAA* was handed down. In its view, at the time of payment Petitioners "knew or should have known that the prices and royalty payments *could* be incorrect." App. 7a. (emphasis added). Thus does the Court of Appeals conclude that its interpretation of OCSLA Section 10 accords with the principle that periods of limitation begin to run on the date the rights subject to the bar have accrued. App. 7a.

This reasoning cannot stand.[26] Even the IBLA readily acknowledged that under its interpretation, now approved by the Court of Appeals, the time when the statute begins to run does not "necessarily coincide[] with the event by which a right to a refund accrues." App. 39a. The uncontroverted historical fact and legal reality is that, although they were subject to judicial review, the ceiling prices based on the FERC's dry rule enjoyed full force and effect unless and until reversed. 15 U.S.C. § 3416 (a)(5). The *INGAA* decision served to change the law *retroactively*, but it did not—and could not—rewrite the

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[26] The Court's expression recalls the jurisprudential view of another day—that of the law as an overbrooding presence in the sky, waiting patiently to be correctly declared. That view has been thoroughly discredited. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) ("we should not indulge in the fiction that the law now announced has always been the law. . . .") *quoting Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in judgment).

legal and historical fact that until the decision was issued, the FERC Orders were *binding and enforceable.* The United States agrees:

> The dry rule increased the maximum lawful ceiling prices applicable to natural gas pursuant to the NGPA because it eliminated the artificial assumption that gas is saturated with water. *For this reason, producers could lawfully collect higher prices for the same volume of gas for the period December 1, 1978 through August 9, 1983.* (emphasis added)

Plaintiffs' and Defendant's Joint Stipulation of Material Facts, ¶ 7 at 2-3. App. 95a.

Accordingly, the decision of the Court of Appeals cannot be squared with the prior decisions of this Court and the other courts of appeal because the Court of Appeals equates knowledge of *possible future* injury with knowledge of *actual existing* injury. It is well-settled that a right accrues, and a statute of limitations commences to run, when a claimant knows or should know of the injury giving rise to a claim. *See, e.g., United States v. Kubrick*, 444 U.S. 111 (1979). But there is no precedent for the proposition adopted by the Court of Appeals that a statute of limitations commences to run before an injury occurs but when the claimant could speculate that an injury might be sustained in the future. As the Third Circuit has pointedly noted, such an application of statutes of limitation would encourage premature lawsuits. *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105, 108-9 (3d Cir. 1983). Prior to *INGAA*, Petitioners could have had no knowledge of an injury in the form of overpayments because as the law then stood no overpayments had been made and Petitioners had suffered no harm. Under these circumstances, Petitioners had no enforceable right to refunds against which the statute of limitations could run.

Moreover, the key issue under Section 10 is the lawfulness of the MMS' royalty requirements, not the law-

fulness of FERC ceiling prices. The proposition of the Court of Appeals that *INGAA* "merely confirmed" that Petitioners' royalties were always excessive necessarily implies that the Interior Department's demand for royalties based on FERC Order Nos. 93 and 93-A ceiling prices was not lawful prior to *INGAA*. But this proposition is untenable. It is a matter of stipulated fact that, prior to *INGAA*, the MMS lawfully required royalty computed on the ceiling prices determined under the dry rule from any lessee receiving such ceiling prices from its gas purchasers. As the United States stipulated:

> The Plaintiffs were required to pay royalties to the MMS for gas produced from OCS leases on the basis of the ceiling prices established and collected by Plaintiffs under the dry rule [set forth in Order No. 93]. The Plaintiffs paid royalties to the MMS for gas produced from OCS leases on the basis of the ceiling prices established and collected by Plaintiffs under the dry rule [set forth in Order No. 93] *in the amounts then lawfully required.* (emphasis added)

Plaintiffs' and Defendant's Joint Stipulation of Facts, ¶ 9 at 3. App. 95a. So long as the FERC's ceiling prices were effective and binding, the Interior Department lawfully required royalties based upon them. Under the lawful regulations of the Interior Department, the value of gas for purposes of calculating royalty can be no less than the gross proceeds received by the lessee.[27] At all times prior to *INGAA*, the Order Nos. 93 and 93-A ceiling prices constituted the gross proceeds received by Petitioners, and the Interior Department lawfully required them to pay royalties based on these gross proceeds.

On the uncontroverted record, the Petitioners' claims for refund did not accrue on the date of the payment

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[27] 30 C.F.R. § 206.152(h) (1990). The same standard is found in the agency's earlier regulations. 30 C.F.R. § 250.64 (1955); 30 C.F.R. § 250.64 (1979); 30 C.F.R. § 206.150 (1983) (redesignation, but no substantive amendment).

because at that time Petitioners had no right to claim refunds. Under OCSLA Section 10, until a person "has made a payment . . . in excess of the amount he was lawfully required to pay," a claim to a refund cannot accrue. In this case, until *INGAA*, no excess payment had been made, and Petitioners' rights to claim refunds had not yet accrued.

For these reasons, the decision of the Court of Appeals conflicts in principle with decisions of this Court and of the other Courts of Appeal. The departure of the Court of Appeals from the longstanding principles governing statutes of limitation warrants this Court's review.

II. THE COURT OF APPEALS INDULGED IN UNWARRANTED DEFERENCE IN UPHOLDING THE DEPARTMENT OF THE INTERIOR'S INTERPRETATION.

The Court of Appeals cites the rule of deference in support of its decision to uphold the IBLA's interpretation of OCSLA Section 10. App. 8a. We submit that this reliance on the rule of deference is misplaced. As the Claims Court correctly noted, no deference is due where the agency's interpretation is contrary to the clear, unambiguously expressed intent of Congress. App. 21a. The Claims Court concluded that the text of OCSLA Section 10, as well as the relevant legislative history, unambiguously states that the two-year limitations period begins to run at the time when the right to claim a refund accrues to a royalty payor. No deference is due to the IBLA's interpretation that is in conflict with the clearly expressed intent of Congress.

Even if it be assumed that the statutory language of Section 10 is ambiguous, however, the Interior Department's interpretation cannot be sustained under the rule of deference for at least three reasons. *First*, as the Claims Court correctly concluded, even if the statute were ambiguous, no deference would be due the agency's interpretation because it is patently unreasonable. App. 22a.

The Claims Court properly found that in the absence of a clear expression of legislative intent it is unreasonable to conclude that the statute was intended to deviate from the general rule that a statute of limitations begins to run when a claim accrues. App. 21-23a. The construction of Section 10 adopted by the Court of Appeals is patently unreasonable because it is inconsistent with the presumption articulated by this Court in *Wurts*.

Under the leading decisions of this Court, an agency's interpretation of a statute will not be upheld when it conflicts with a longstanding presumptive rule of statutory construction unless the agency's interpretation is supported by a clear statement of legislative intent to depart from the presumptive rule. *EEOC v. Arabian American Oil Co.*, —— U.S. ——, 111 S. Ct. 1227, 1235-36 (1991); (reversing an Equal Employment Opportunity Commission decision as contrary to the presumption against the extraterritorial applicability of a statute); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575-77 (1988) (reversing a National Labor Relations Board decision as contrary to the presumption against interpretation of a statute in a manner that would render it unconstitutional). Accordingly, this Court has rejected an agency's statutory interpretation that is at odds with a fundamental presumptive rule of statutory construction, even where the agency's interpretation represented an otherwise permissible reading of the statutory text and legislative history, in the absence of a clear legislative statement showing the agency's interpretation to be the only plausible or reasonable construction.[28] *EEOC v.*

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[28] There is some authority for drawing a distinction between a weak presumptive rule of construction and a "clear statement" rule. *See, e.g., EEOC v. Arabian American Oil Co.*, —— U.S. ——, 111 S. Ct. at 1237-1240 (Marshall, J. dissenting). To the extent the distinction has continuing validity after *Arabian American Oil*, it does not affect the issue presented in this case. Inasmuch as the presumption stated in *Wurts* applies in the absence of "language so

Arabian American Oil Company, —— U.S. at ——, 111 S. Ct. at 1231; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. at 575-78.

The decision of the Court of Appeals conflicts with these principles. The Court of Appeals indulged in an unwarranted degree of deference in upholding the IBLA's interpretation of OCSLA Section 10 because the agency's interpretation directly conflicts with the presumption that statutes of limitation are intended to begin to run no earlier than when a right of action to enforce the claim subject to the statutory bar has accrued. As is demonstrated by the decision of the Claims Court, there is no clear statement in the text or legislative history of OCSLA Section 10 evincing a Congressional intent to establish a limitations period that could run before a claimants' right of action accrues. To the contrary, the Claims Court's decision demonstrates that at least one reasonable reading of OCSLA Section 10—if not the only reasonable reading—is that the limitations period of Section 10 begins to run when the right to claim a refund has accrued.

This Court's leading decision regarding the rule of deference, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides no support for the decision of the Court of Appeals. Where an agency's interpretation of a statute conflicts with a presumptive rule of interpretation, such as in *Arabian American Oil* and *DeBartolo*, the rule of deference does not trump the otherwise applicable presumption. To the contrary, in the absence of a clear statement of legislative intent in support of the agency's interpretation, the agency's interpretation must give way to the presumption because such an interpretation is unreasonable. The rule in *Chevron* does not provide for abdica-

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clear as to leave room for no other reasonable construction," 303 U.S. at 418, it is apparent the presumption in *Wurts* expressly rises to the level of a "clear statement" rule.

tion to administrative agencies, but rather provides for upholding such agencies' reasonable constructions of statutes when judged on the basis of traditional rules of statutory construction. 467 U.S. at 843 n.9; *EEOC v. Arabian American Oil Co.*, —— U.S. ——, 111 S. Ct. at 1237 (Scalia, J., concurring).

Second, the Interior Department's vacillation about the proper definition of Section 10 reaffirms that the agency's current interpretation is entitled to no deference. The agency's current interpretation is contrary to its own earlier interpretations of OCSLA Section 10, as well as to the interpretation of the Comptroller General. If deference is due, it should be accorded these earlier interpretations.

In deciding whether deference is appropriate, the Court has held that a court must "consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed." [29] Where an agency's interpretation conflicts with the agency's earlier interpretation of the same statute, the latter interpretation "is entitled to considerably less deference" than is a consistently held agency view.[30]

The MMS and IBLA relied on an interpretation of Section 10 issued by the Solicitor of the Department of the Interior. *See Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 I.D. 1090, 1101-1102 (1981). But this was by no means the first word on the subject by the Executive Branch, or even by the Interior Department itself. The original interpretation of OCSLA Section 10 by the Executive Branch was that, when roy-

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[29] *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987).

[30] *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *INS v. Cardoza-Fonseca*, 480 U.S. 421 at 446-47 n.30 (1987); *See also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 370-371 (1986); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

alty payments become excessive because of retroactive agency action, the two-year period begins running from the date of the retroactive decision, *not* from the date of royalty payment. As the Assistant Solicitor concluded with respect to Section 10:

> [I]t is the date when the overpayment comes into existence from which the statute of limitations is measured rather than the date on which the lessee paid certain money which only subsequently became an overpayment.[31]

Similarly, the Comptroller General concluded that Section 10 began to run only when a payment became excessive, even though the payment was in the lawfully required amount when paid, because it is only at the later date "that the amount or, for that matter, even the existence of an overpayment became known." [32] Indeed, even after the issuance of *INGAA*, the Interior Department official charged with responsibility for administering the collection of royalties and the payment of refunds publicly asserted that no refund requests were due in the circumstances here presented until the judgment in *INGAA* became final. App. 56a.

Under these prior constructions by the Executive Branch, the time at which Section 10 begins to run is when all events have occurred that permit the Secretary of the Interior to determine that an excess payment has been made. This is only when a payment has been made *and* when all necessary events have occurred that establish that the payment is in excess of the amount lawfully required. If deference be due the Government's interpretation of OCSLA Section 10, deference should be

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[31] Memorandum from Frederick V. Ferguson, Assistant Solicitor—Minerals Division of Public Lands to Director, Geological Survey (Oct. 12, 1972). App. 68a.

[32] Letter from Comptroller General of the United States Elmer B. Staats to Hon. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs, United States Senate (July 8, 1974). App. 72a.

given to the Comptroller General's opinion [33] and to the initial interpretation of the Assistant Solicitor.

Third, as the Claims Court found, the agency's interpretation was unreasonable and is therefore not entitled to deference because it would result in absurd consequences. As the Claims Court explained, the Interior Department's interpretation of Section 10 would lead to the burdensome and useless filing of protective claims, the validity of which are contingent on possible future events. The Claims Court recognized that this untoward result is a direct consequence of interpreting Section 10 as beginning to run before the occurrence of all events giving rise to a right to claim a refund. It is unreasonable to attribute to Congress such an irrational intent. As the Claims Court noted:

> each time a lessee made a royalty payment, it would necessarily have to file an immediate request for refund to protect its interests should the royalty payment later be declared excessive. Many of these requests would, at the time of filing, be unwarranted . . . . It requires little prescience to see that such a process would lead to an excessive burden for both lessees extracting oil and gas on federal lands and the governmental agencies overseeing those leases and refund request filings. This would be especially true when royalty payments are made on a monthly basis, as here. Such confusion and uncertainty could not have been the intent of Congress.

App. 22a.

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[33] The Government cannot reasonably be heard to argue that the Comptroller General's interpretation should not be given weight in interpreting Section 10 when the Department of the Interior, as well as Congress, has repeatedly sought the guidance of the Comptroller General on questions of statutory interpretation involving payment of royalty refund claims against the Government. *See* App. 72a and 79a. *See United States v. Bergh*, 352 U.S. 40, 46-47 (1956) (Comptroller General's interpretation is entitled to great weight); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973) (Comptroller General's decision held to be binding on the Executive Branch).

The deluge of contingent refund requests anticipated by the Claims Court, in addition to being "largely unwarranted" at the time filed, would serve no budgetary or other purpose to the Interior Department, to the Congress, or to the Treasury Department because until the right to claim refunds accrues the requests cannot be granted. Until occurrence of all events that give rise to an excess payment, the Secretary of the Interior cannot determine that an excess payment has been made and therefore cannot, as required by OCSLA Section 10(a), "certify the amounts [to be refunded] . . . to the Secretary of the Treasury . . . ." [34] Further, the Secretary of the Interior would be unable to submit a report to Congress specifying "the amount of such refund or credit, and a summary of the facts" underlying such a refund request, as required by OCSLA Section 10(b).[35]

Statutes should be interpreted so as to avoid absurd results.[36] Under the interpretation of Section 10 embodied in the decision of the Court of Appeals, Petitioners and other lessees will be subjected to the burden of filing speculative notices designed to protect against the spectrum of unknown, but imaginable, future events.[37] Inter-

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[34] 43 U.S.C. § 1339(a).

[35] 43 U.S.C. § 1339(b).

[36] *United States v. Turkette*, 452 U.S. 576, 580 (1981); *In re* Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

[37] Royalty payors would have to file protective filings guarding against numerous other contingencies besides judicial actions such as the one underlying this proceeding. For example, a change in the royalty amount due to the Interior Department could result from any retroactive revision of a FERC-approved ceiling price for natural gas, a retroactive legislative or regulatory change in the required federal royalty share, or a retroactive change in MMS' definition of "gross proceeds". Under the Court of Appeals' interpretation of Section 10, royalty payors are required to monitor carefully these and other such issues for any developments that might possibly give rise to a retroactive change in the required royalty. Whenever such a possible judicial, administrative or legislative change can be imagined, an industry-wide barrage of protective notices will be required.

vention by this Court is necessary to correct the unwarranted deference accorded by the Court of Appeals to the Interior Department's interpretation of OCSLA Section 10 in order to correct the disruptive consequences of the Court of Appeals' decision.

* * * *

In sum, the Court of Appeals has swept aside fundamental principles of statutory construction and of review of agency decisions in order to adopt an interpretation of a statute of limitations that permits the limitations period to commence to run, and even to run in full, prior to the time when the rights subject to its bar have accrued. This interpretation will impose a useless and unfair burden on lessees to divine future events that could alter the royalty payments due each month on the myriad producing oil and gas leases in the OCS and to file speculative refund requests that are contingent on possible events yet to come. The result will be to bar the legitimate requests for refund of those lacking perfect foresight, and to flood the Interior Department with speculative protective requests which in the vast majority of cases will prove unnecessary. Review by this Court is essential to correct the misapplication of fundamental doctrines of this Court, as followed by the other courts of appeal, and to avert a "paper chase" never intended by Congress as a condition to the approval of otherwise meritorious requests for refund of overpayments made to the Interior Department.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5053

CHEVRON U.S.A., INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC.,

Plaintiffs-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

Appealed from: U.S. Claims Court

Judge Tidwell

Decided: January 16, 1991

Thomas J. Eastment, Baker & Botts, of Washington, D.C., argued for plaintiffs-appellees. With him on the

brief were *Michael E. Coney*, Shell Offshore, Inc., New Orleans, Louisiana, *J. Berry St. John, Jr.* and *George J. Domas*, Liskow & Lewis, New Orleans, Louisiana, *Marshall Taylor Darden*, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, Louisiana, and *Ernest J. Altgelt, III*, CONOCO, Inc., of Houston, Texas. Of counsel was *Drew J. Fossum*, Baker & Botts, of Washington, D.C.

Elizabeth Ann Peterson, Department of Justice, of Washington, D.C., argued for defendant-appellant. With her on the brief were *Richard B. Stewart*, Assistant Attorney General, *George W. Van Cleve*, Acting Assistant Attorney General, *Margaret M. Sweeney*, and *John A. Bryson*. Also on the brief was *Howard W. Chalker*, Department of the Interior, Washington, D.C., of counsel.

Before NIES, *Chief Judge*, LOURIE and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

The United States appeals from the judgment of the United States Claims Court, *Chevron U.S.A., Inc. v. United States*, 17 Cl. Ct. 537 (1989), granting the claims of appellee natural gas producers for refunds of excessive royalties paid on Government leases. The Government asserts that the Claims Court erroneously overturned the final decision of the Department of Interior Board of Land Appeals holding that all of the asserted requests for refunds were untimely under the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1356 (1982) (OCSLA)). This court reverses and remands.

BACKGROUND

Plaintiffs-appellees are natural gas producers who leased submerged lands on the Outer Continental Shelf. The Minerals Management Service (MMS) of the Department of the Interior leases these lands for offshore

oil and gas development. MMS collects royalties on each lease.

In 1978, the Natural Gas Policy Act (NGPA) set maximum prices for natural gas. 15 U.S.C. §§ 3301-3432 (1982). Under the NGPA, the Federal Energy Regulatory Commission (FERC) enforces those ceiling prices. MMS linked lease royalties to the ceiling prices. A change in the prices thus changed the royalty.

Before the NGPA, the "wet rule" governed gas measurements and pricing. The "wet rule" assumed that water vapor in the natural gas reduced its energy content. FERC Order No. 93 changed the gas measurement standard to the "dry rule." This new rule measured the energy content of gas without reference to water vapor content. Order No. 93, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1977-81] (CCH) ¶ 30,172 (July 16, 1980); Order No. 93-A, 15 F.E.R.C. (CCH) ¶ 61,075 (April 24, 1981). The ceiling price under the "dry rule" exceeded the "wet rule" ceiling. Appellees therefore paid higher royalties when the "dry rule" was in effect.

Several gas purchasers sought judicial review of FERC's order. In 1983, the United States Court of Appeals for the District of Columbia Circuit vacated FERC's order. *Interstate Natural Gas Ass'n of Am. v. F.E.R.C.*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (*INGAA*). The D.C. Circuit determined that FERC lacked authority to abandon the "wet rule." Furthermore, the court ordered FERC to reinstate the "wet rule." This order retroactively reduced prices. Due to the reduction in prices, the lease royalties also fell. Therefore, for the period from late 1978 through 1984 (when the D.C. Circuit's order became final), lessees had overpaid royalties.

FERC ordered gas producers to refund to gas pipeline and distribution companies the difference between "wet rule" and "dry rule" prices. The producers then sought

reimbursement from MMS for excess royalty payments. The producers in the case at bar filed a refund application within two years of the D.C. Circuit's decision, but not within two years of the payment of royalties to MMS.

MMS denied all requests for refunds of payments made prior to November 9, 1981 and filed after November 9, 1983 on the ground of untimeliness under § 1339(a) of the OCSLA. Refund Procedures and Order to Pay Royalties, 49 Fed. Reg. 31779, Aug. 8, 1984 (Refund Procedures). Section 1339(a) requires gas producers to file for refunds "within two years after the making of the payment." 43 U.S.C. § 1339(a). MMS, however, made an exception for those lessees who filed "proper notice with MMS which tolled the 2-year statute." Final Order, on Royalty Refund Requests Resulting from FERC Orders 93/93A, 49 Fed. Reg. 47120, Nov. 30, 1984 (Final Order).

The Department of Interior Board of Land Appeals (IBLA) affirmed MMS's decision. The IBLA held that § 1339(a) gives a lessee two years from the payment of royalties to apply for a refund. *Shell Offshore, Inc.*, 96 IBLA 149, 165 (1987). The Claims Court ruled that OCSLA's two-year limitation on refund applications did not begin to run until the D.C. Circuit vacated FERC's "dry rule" order. The Government appeals from the decision of the Claims Court.

DECISION

This court must determine whether the Claims Court correctly interpreted 43 U.S.C. § 1339(a). Specifically, this court must determine when the two-year limitation on refund requests begins to run.

The lessees brought their action in the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (Supp. 1990). The Tucker Act grants the Claims Court jurisdiction over monetary claims founded on acts of Congress. The Claims Court appropriately took jurisdiction of the refund claim

based on the OCSLA. This court reviews *de novo* the legal conclusions of the Claims Court. *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984); *Heisig v. United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983).

43 U.S.C. § 1339(a) states:

> [W]hen it appears to the satisfaction of the Secretary [of Interior] that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, *if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment* . . . .

(Emphasis added.) This language requires lessees to request the refund of any excess payment "within two years after the making of the payment."

To qualify for a refund, a lessee must make a timely request. The phrase "within two years after the making of the payment" defines the timeliness of a refund request. By its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment.

The context of this phrase underscores its clear meaning. The statute does not use the phrase "making of the payment" solely to condition a refund upon a timely request. Rather, the phrase—in a slightly different grammatical form—also appears in an introductory clause: "when it appears . . . that any person has *made a payment* to the United States in connection with any lease under this subchapter . . . ." 43 U.S.C. § 1339(a) (emphasis added). Thus, the "payment" phrase defining timely requests refers to the original excessive royalty

payment. This context further links the refund request to the original royalty payment.

In the case at bar, appellees first requested a refund more than two years after making excessive payments. Therefore, the statute barred any refund. The statute did not authorize the Secretary of Interior (Secretary) to pay, nor appellees to receive, any refund requested past the two-year limit.

The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

The Claims Court determined that the phrase "making of the payment" refers to the making of an excess payment. *Chevron*, 17 Cl. Ct. at 541. On this point, the Claims Court interpretation is correct. The Claims Court also reasoned that the payments "became excessive" when the D.C. Circuit invalidated the FERC rule. *Id.* at 543. On this point, the Claims Court strayed from the statute. The *INGAA* ruling did not render the royalties excessive, but merely confirmed that fact. *Cf. Barenfeld v. United States*, 442 F.2d 371 (Ct. Cl. 1971). In any event, the Claims Court erred by measuring the two-year limitation from the issuance of the *INGAA* ruling. The D.C. Circuit's ruling simply does not constitute "the making of [a] payment." Therefore, the Claims Court cannot correctly measure the two-year limit from the time of the D.C. Circuit decision.

The Claims Court also reasoned erroneously that enforcing the language of § 1339(a) would cause the "statute of limitations to run and expire before any cause of

action had accrued." * *Chevron*, 17 Cl. Ct. at 542. Under federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred. *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (quoting *Oceanic S.S. Co. v. United States*, 165 Cl. Ct. 217, 225 (1964)). Under the OCSLA, an overpayment gives rise to a claim. The statute does not condition eligibility for a refund on anything other than a request within two years of an excess payment. Therefore, claims for refunds accrue on the date of the payment. The two-year limitation did not expire before it accrued.

Appellees argue nonetheless that they were ignorant of the claim accrual until after the *INGAA* decision. Ignorance of claim accrual does not automatically toll the running of a statute of limitations. *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 826 (2d Cir. 1952) (quoting *Kennedy v. Johns-Manville Sales Corp.*, 62 A.2d 771, 773 (Conn. 1948)). Rather, the statute commences to run when claimants know or should know of their potential claims. *Townley v. Norfolk & W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989). At the time of the royalty overpayments, appellees were aware that gas purchasers would challenge the new "dry rule." Appellees knew or should have known that the prices and royalty payments could be incorrect. The event giving rise to appellees' refund claim was payment of the initial royalty. Again, the two-year limitation did not expire before it accrued.

Appellees had a procedural recourse to prevent expiration of the two-year time limit during pendency of the D.C. Circuit litigation. On December 15, 1981, the Department of Interior Solicitor (Solicitor) set forth the

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* Technically speaking, § 1339(a) is not a "statute of limitations." The phrase "statute of limitations" conventionally refers to temporal limits on a judicial, rather than an administrative, claim. *American Tel. & Tel. Co. v. United States*, 685 F.2d 1361, 1364 n.7 (Fed. Cir. 1982).

required procedures for requesting a refund. Refunds and Credits Under the Outer Continental Shelf Lands Act, 88 I.D. 1090 (1981) (*Credits*). To claim a refund, lessees had to file a written request, stating the specific amount sought and the reason why the amount levied was excessive. *Credits* at 1099. MMS, citing the Solicitor's opinion, promulgated procedures permitting producers to toll the two-year limitation by giving notice to the Secretary of an intent to seek a refund. Final Order, at 47120; Refund Procedures, at 31779. Thus, gas producers had a means to protect their potential refund claims under the statute. The United States Court of Appeals for the Fifth Circuit and the FERC independently determined that the producer could have satisfied § 1339(a)'s two-year bar by simply notifying MMS. *See Shell Offshore, Inc. v. F.E.R.C.*, 858 F.2d 1147, 1153 (5th Cir. 1988), *reh'g denied* (1989).

This court has held:

> [I]n matters of statutory interpretation, the construction adopted by an agency charged with the duty to administer the statute . . . is usually given deference.

Beneficial Corp. & Subsidiaries v. United States, 814 F.2d 1570, 1574 (Fed. Cir. 1987). This court has further held that the agency's decision should receive no deference if it is unreasonable or "contravenes clearly discernible legislative intent." *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The IBLA's opinion was well-reasoned and did not violate the intent of Congress.

The statute does not support the Claims Court's decision. Accordingly, we remand this case to the Claims Court with instructions to dismiss, unless the Claims Court determines that appellees met the notice requirements.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 90-5053, -5151

CHEVRON U.S.A., INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC.,

Plaintiffs-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

JUDGMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 350-87L, 352-87L, 353-87L, 384-87L, 391-87L, 409-87L, 554-87L, 679-87L

This cause having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED AND REMANDED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhardt
FRANCIS X. GINDHART
Clerk

Dated Jan. 16, 1991

ISSUED AS A MANDATE: April 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Revised: 09/26/90

90-5053, -5151

CHEVRON U.S.A., INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC.,

Plaintiffs-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

Before NIES, Chief Judge, LOURIE, Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on April 11, 1991.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: April 4, 1991

cc: ELIZABETH ANN PETERSON
MARSHALL DARDEN, J. BERRY ST. JOHN, JR.,
ERNEST J. ALTGELT III, THOMAS EASTMENT,
MICHAEL CONEY

CHEVRON USA INC v US, 90-5053
(CLM 350-87L/676-87L)

NOTE: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Revised: 09/26/90

90-5053, -5151

CHEVRON U.S.A. INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC.,

Plaintiffs-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: April 17, 1991

cc: ELIZABETH ANN PETERSON
MARSHALL DARDEN, J. BERRY ST. JOHN, JR.,
ERNEST J. ALTGELT III, THOMAS EASTMENT,
MICHAEL CONEY

CHEVRON USA INC v US, 90-5053
(CLM 350-87L/676-87L)

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

Nos. 350-87L
352-87L
353-87L
384-87L
391-87L
409-87L
554-87L
679-87L

(Filed: July 24, 1989)

CHEVRON U.S.A., INC., *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Statutory Interpretation; APA Review Of Final Agency Decision; Issues of Law v. Fact; No Deference To Agency; Statute Of Limitations; Refund Of Excess Oil And Gas Royalty Payments By Defendant.

Thomas J. Eastment, Washington, D.C.; *M. Taylor Darden*, New Orleans, Louisiana; *J. Berry St. John, Jr.*, New Orleans, Louisiana; *Ernest J. Altgelt, III*, Houston,

Texas; *David A. Waskowiak*, New Orleans, Louisiana, for plaintiffs.

Margaret M. Sweeney, Washington, D.C., for defendant.

ORDER

TIDWELL, *Judge*:

This consolidated action is before the court on parties' cross-motions for summary judgment. Plaintiffs, separate oil companies, sought a refund of excess royalties paid to the United States on the sale of natural gas extracted from federal lands on the outer continental shelf (OCS), pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1982). The pivotal issue in this case is which of two contradictory interpretations of 43 U.S.C. § 1339(a) (1982) applies to plaintiffs cause of action. The statute allows the refund of excess royalty payments if the payor makes a timely refund request to the Secretary of Interior. In a final decision of the Department of Interior Board of Land Appeals (IBLA), defendant refused to refund plaintiffs' royalties based upon plaintiffs' alleged failure to make a timely request. The court is asked to review that finding, to interpret 43 U.S.C. § 1339, and to determine when the two year period for making a timely refund request began to run.

FACTS

Plaintiffs are oil and gas companies holding leases on federal land located on the OCS. Under the OCSLA, the Mineral Management Service (MMS) has the responsibility of collecting royalties from lessees of OCS lands based on the amount of oil and gas extracted. The Federal Energy Regulatory Commission (FERC) adminis-

ters the price setting procedures for the eventual sale of the oil and gas. Through November 1978, plaintiffs paid royalties to defendant on monies received from the sale of gas extracted from their OCS leases based on a calculation known as the "wet rule." Under the "wet rule," the maximum prices for natural gas were set according to energy measurements in British thermal units (Btu) based on the assumption that the gas was saturated with water. The energy content reflected by saturated gas was lower than the actual energy content, resulting in a lower selling price per unit than would be otherwise.

On July 16, 1980 and April 24, 1981, FERC issued Orders No. 93 and 93-A, respectively, instituting what was known as the "dry rule." Under this rule, FERC required that maximum prices for natural gas be set according to Btu measurements based on the actual energy content of the gas delivered to purchasers. Unlike the "wet rule," the "dry rule" reflected the energy content of unsaturated gas, which resulted in a measurably higher energy content per unit. Consequently, the maximum sales price for natural gas increased. FERC also required the retroactive application of the "dry rule" to December 1, 1978. Purchasers of plaintiffs' natural gas were thus required to pay higher gas prices and to make retroactive payments to plaintiffs. Plaintiffs, in turn, were required to make retroactive royalty payments to MMS on the additional monies received.

Purchasers of plaintiffs' natural gas challenged Orders No. 93 and No. 93-A in the United States Court of Appeals for the District of Columbia on June 19, 1981. On Aug. 9, 1983, the D.C. Circuit vacated the FERC Orders and ordered reinstatement of the "wet rule." *Interstate Natural Gas Assoc. v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied sub nom., Exxon Corp v. Interstate Natural Gas Assoc.*, 465 U.S. 109 (1984) [hereinafter *INGAA*]. The Supreme Court denied certiorari on March 19, 1984. Based on the *INGAA* decision, FERC promul-

gated interim regulations and Final Orders (Nos. 399, 399-A, 399-B) requiring the recalculation of natural gas prices using the "wet rule" retroactive to December 1, 1978. The regulations also required plaintiffs to refund the excess payments made by purchasers under the "dry rule." Plaintiffs returned the monies to the purchasers, then requested refunds from defendant on the excess royalties paid by plaintiffs. On November 30, 1984, the MMS denied plaintiffs' refund requests based on its reading of 43 U.S.C. § 1339(a). Upon denial of their requests for refund, plaintiffs appealed the MMS decision to the IBLA. The IBLA issued its final decision on March 17, 1987, affirming the MMS interpretation of 43 U.S.C. § 1339(a). Plaintiffs then filed a claim in this court seeking review of the IBLA decision. Defendant responded with a motion for summary judgment, to which plaintiffs cross-moved on the specific issue of liability.

DISCUSSION

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). A genuine issue of material fact is present if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit, and its materiality is determined by the substantive law applicable to the case. *Id.* The court finds, and the parties agree, that there are no material facts in dispute and that this case is ripe for disposition by way of summary judgment.

The character of this case is one of a review of a final agency decision. The court notes that its jurisdiction in this case is proper and that plaintiffs have exhausted their administrative remedies. In reviewing the IBLA decision, the court may "set aside agency decisions found to be illegal because they are arbitrary, capricious,

an abuse of discretion, unsupported by substantial evidence, not in substantial compliance with procedural requirements, or otherwise contrary to law." *Foote Mineral Co. v. United States*, 228 Ct. Cl. 230, 234, 654 F.2d 81, 85 (1981). The court need not agree with the agency's decision, but must determine whether the decision was based on relevant factors, whether the decision lacked a rational basis, or whether the decision represented a clear error of judgment. *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974); *Rogers v. United States*, 14 Cl. Ct. 39, 46 (1987).

In dispute is the proper interpretation of 43 U.S.C. § 1339, which gives the Secretary of Interior authority to refund excessive payments made to the United States under OCS leases. A refund is required if the OCS lessee "files a request for repayment of such excess . . . within two years after the making of the payment . . . ." 43 U.S.C. § 1339(a). Plaintiffs read this language as constituting a two year statute of limitations which would begin to run only after a refund payment became excessive. Plaintiffs argued that they made royalty payments as required by law under the "dry rule," and that it was not until the "dry rule" was vacated by the D.C. Circuit and certiorari denied by the Supreme Court that their refund payments became excessive. Defendant, on the other hand, did not characterize section 1339 as a statute of limitations, but simply argued that plaintiffs had two years from the original payment of royalties to file for a refund, based upon the "clear wording" of the statute.[1]

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[1] Defendant argued that the "payments" language should be characterized as a right to a refund or a right to proceed with a cause of action, not a statute of limitations, thus warranting deference to the agency's interpretation of the statute. The court sees no difference between a right to a refund and a statute of limitations. Indeed, defendant conceded this point in its briefs, but re-opened the issue at oral argument. The court in *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147 (5th Cir. 1988), a case upon which defendant placed great weight, specifically found that sec-

Since plaintiffs failed to file requests for repayment within the requisite two year period from the dates they made actual payments to MMS, defendant argued, plaintiffs were barred from asserting any right to a refund.

It is academic that statutes are to be construed to give effect to the statutory language of the whole. The Supreme Court has repeatedly observed that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985). The parties dispute the interpretation of the phrase, "such excess shall be repaid . . . if a request for repayment . . . is filed within two years after the making of the payment . . . ." 43 U.S.C. § 1339. When read by itself, out of context, the language would appear to support defendant's interpretation. The court, however, must look to the entire statute to give proper meaning to the phrase. 43 U.S.C. § 1339 states:

> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment . . . . The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.

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tion 1339 was a statute of limitations, contrary to defendant's assertion. *Id.* at 1151. The court concurs, and treats section 1339 accordingly.

> (b) No refund or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for the transmittal to the appropriate legislative committee of each body respectively. . . .

When read as the conclusion of a sentence which refers three times to "excess" payments, the statement that a refund must be requested "within two years after the making of the payment" clearly refers to the making of an "excess" payment. Every mention of "payment" in the statute is made in reference to "excess payment." No disjunctive exists which would serve to suggest that Congress intended to attach an alternate, opposite or contrasting meaning to its use of the word "payment." In addition, subsection (b) begins with the phrase, "[n]o refund or credit for such excess payment shall be made . . ." with further references to reports of such refunds to be made to Congress. It is apparent that the single mention of the word "payment" in subsection (a) refers to an "excessive payment." When interpreting statutes, the court is "obligated to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Viewing section 1339 as a whole, the court thus finds that the two year period in which to file a refund request began to run when the lessee made an excess payment. Such a construction gives effect to the entire statute and preserves the substance of the language embedded in its overall form.

It is without question that the court's construction of section 1339 stands in direct conflict with the IBLA inter-

pretation. The IBLA asserted that "[t]here is no ambiguity in the wording of the statute; the terms of the Act [43 U.S.C. § 1339] cannot be varied simply because the appellants [plaintiffs] may for other reasons appear to deserve refunds." *Shell Offshore, Inc.*, 96 I.B.L.A. 149, 165 (1987). The court agrees; the statute is not ambiguous and the terms may not be varied to accommodate the needs of a party. The court does not seek to change the terms of section 1339, it seeks only to interpret the section in the manner Congress reasonably intended. The two year period did not begin to run until a payment became excessive. This reading is not only consistent with statutory construction, but also the legislative history, to which the court now turns.

Section 1339 of the OCSLA was based upon the limitations period of a 1919 onshore lands leasing statute, which was considered to be an "accrual" type of statute, *i.e.*, the limitations period did not begin to run until after the right had accrued. *See Hearings Before the Committee on Interior and Insular Affairs, United States Senate*, 83rd Cong., 1st Sess., 638-39 (1953). "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued." *United States v. Wurts*, 303 U.S. 414, 418 (1938). The legislative history of section 1339 states simply:

> Section 10 [43 U.S.C. § 1339] provides that where a lessee has made payments to the Federal Government in excess of those required, repayment may be made to him. The Interior Committees of the Senate and House of Representatives will have a period of 30 days in which to examine proposed refunds before they are made.

S. Rep. No. 411, 83rd Cong. 1st Sess. 14 (1953). The legislative history intimates that repayments be made on payments "in excess of those required." Nowhere in the legislative history did Congress even hint that the

statute should be changed from an accrual statute to a bar to claims that had yet to come into existence—defendant's position. *Wurts*, 303 U.S. at 418. The legislative history supports the court's reading of section 1339.

Defendant argued that the court must give deference to the agency's construction of section 1339. Defendant correctly asserted that the statutory interpretation of an agency charged with the duty to administer the statute is usually given deference. *Beneficial Corp. v. United States*, 814 F.2d 1570 (Fed. Cir. 1987). The United States Court of Appeals for the Federal Circuit stated, "[w]e are not unmindful that, in matters of statutory interpretation, the construction adopted by an agency charged with the duty to administer that statute . . . is usually given deference." *Beneficial*, 814 F.2d at 1574 (citations omitted). The court continued:

> Giving deference, however, does not entirely dispense with meaningful review . . . . As stated in *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986), if the agency interpretation "contravenes clearly discernible legislative intent" or is otherwise unreasonable, it should not stand.

Beneficial, 814 F.2d at 1574 (citations omitted). When the legislative history reveals the clear intent of Congress, the judiciary and the agency must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). If, however, the court determines that Congress has not directly addressed the precise question at issue, the question for the court is whether the agency's answer is unreasonable or based on a permissible construction. *Id.* Assuming, *arguendo*, that the statutory construction and legislative history of section 1339 is unclear, the court now turns to the rea-

sonableness of defendant's interpretation to determine whether any deference should be given to the agency in this instance.

Defendant would have the two year statute of limitations of section 1339 begin to run from the time an initial royalty payment was made, whether or not it was excessive. Statutes of limitation have the purpose of barring stale claims; they do not serve to preclude claims that have not yet come into existence. Defendant's position would allow the statute of limitations to run and expire before any cause of action had accrued. Such a result is unreasonable and without judicial support. This court has repeatedly held that statutes of limitation begin to run only when a cause of action accrues. *American Tel. & Tel. Co. v. United States*, 231 Ct. Cl. 360, 368, 685 F.2d 1361, 1364 (1982). *Montana Bank of Circle v. United States*, 7 Cl. Ct. 601, 609 (1985). Nothing in the legislative history of section 1339(a) would lead one to conclude otherwise. Should defendant's motion be granted and the IBLA interpretation allowed to stand, each time a lessee made a royalty payment, it would necessarily have to file an immediate request for refund to protect its interests should the royalty payment later be declared excessive. Many of these requests would, at the time of filing, be unwarranted. This, however, would be the only method to insure the refund of an excess royalty payment. It requires little prescience to see that such a process would lead to an excessive burden for both lessees extracting oil and gas on federal lands and the governmental agencies overseeing those leases and refund request filings. This would be especially true when royalty payments are made on a monthly basis, as here. Such confusion and uncertainty could not have been the intent of Congress. Consequently, the court gives no deference to the agency construction of section 1339 because it is unreasonable and thus "should not stand." *Beneficial*, 814 F.2d at 1574.

Defendant also argued that when statutory interpretation is dependent upon the expertise of the agency with the duty of administering the statute, deference should be given to the agency's construction. The court agrees in principle. The interpretation of the portion of section 1339 at issue, however, is not dependent on the agency's expertise. While the court does not dispute defendant's administrative duties in overseeing refunds and credits under the OCSLA, the statutory construction at issue deals with a statute of limitations. The resolution of such an issue does not depend on agency expertise; it is a question of law which this court may interpret without giving deference to the agency. *See Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987); *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986). No deference need be given the agency in this instance.

In support of its position, defendant placed great weight on the Fifth Circuit opinion in *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147 (5th Cir. 1988). Defendant directed the court to the following language from that case:

> Petitioners [plaintiffs] certainly should have known that the dry rule, which was highly controversial from its inception, had a high probability of being reversed, thus mandating repayments of overcharges . . . . The petitioners were also clearly aware of the requirements to file a request for repayment of royalty payments to MMS within two years of the date of payment under the plain terms of § 10(a) of OCSLA. On top of that, the Solicitor of the Department of Interior issued an opinion in 1981 addressing the very type of situation faced by petitioners: that is, how producers could protect their interests by filing notice with MMS.

Shell, 858 F.2d at 1152. While the *Shell* court did address related issues dealing with the same parties, the court expressly noted:

> Presently pending before the United States Court of Claims [sic] is the issue of whether the two year period begins to run at the time of payment to the MMS or at the time it was adjudicated in *INGAA-I* that overpayments were made.

Id. at 1151 n.4. It is the court's present determination, after analyzing the language of 43 U.S.C. § 1339, looking at the legislative history, and reviewing the reasonableness of defendant's interpretation, that the two year statute of limitations of section 1339 began, at the earliest, after the adjudication of *INGAA*.[2]

CONCLUSION

The court thus finds that defendant failed to show that it is entitled to judgment as a matter of law. Neither the IBLA decision nor defendant's memoranda exhibit any substantial evidence which would convince the court that their interpretation of section 1339 is permissible. In sum, after hearing oral argument, considering the parties' briefs, exhibits and the administrative record, the court finds defendant's construction of section 1339 unreasonable, and that the IBLA's decision lacked a rational basis. The court therefore grants plaintiffs' motion for partial summary judgment and similarly dismisses defendant's motion. Pursuant to RUSCC 42(c), the court finds for plaintiffs on the issue of liability and orders the parties to determine quantum within 30 days of this Order.

IT IS SO ORDERED.

/s/ Moody R. Tidwell
MOODY R. TIDWELL
Judge

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[2] Plaintiffs filed their refund requests within two years of both the District Court decisions and the Supreme Court's denial of certiorari, and thus the court need not make the choice between the two in deciding when plaintiffs' rights actually accrued.

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard
Arlington, Virginia 22203

SHELL OFFSHORE, INC.

IBLA 85-282 through 85-297 Decided March 17, 1987

Appeal from a decision of the Minerals Management Service denying Federal Energy Regulatory Commission order Nos. 93 and 93-A refund requests.

Affirmed in part; reversed in part.

1. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

2. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

3. Administrative Procedure: Administrative Procedure Act—Regulations: Force and Effect as Law

   "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural

requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

4. Administrative Procedure: Administrative Procedure Act—Regulations: Force and Effect as Law

   If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979).

5. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identifying the claimant, the lease affected, and the reasons a refund is sought.

APPEARANCES: John T. McMahon, Esq., and Craig H. Walker, Esq., New Orleans, Louisiana, for Shell Oil Company and Shell Offshore, Inc.; Carmen Chidester Farrell, Esq., Tulsa, Oklahoma, for Cities Service Oil and Gas Corporation and Oxy Petroleum, Inc.; Thomas J. Eastment, Esq., and Stephen L. Teichler, Washington, D.C., for Pogo Producing Company, Tenneco Oil Company, Pennzoil Oil & Gas, Inc., and Houston Oil & Minerals Corporation; James J. Doyle, Jr., Esq., Houston, Texas, for Exxon Co. U.S.A.; Donald J. Brannan, New

Orleans, Louisiana, for Amoco Production Company; David T. Deal, Esq., Washington, D.C., for the American Petroleum Institute; Arthur P. Mitchell, Esq., New Orleans, Louisiana for Chevron U.S.A. Inc.; K. Susie Adams, Esq., Houston, Texas, for Gulf Oil Corporation; Camille N. Tarics, Esq., Houston, Texas, for Columbia Gas Development Corporation; Michael J. Manning, Esq., and James F. Moriarty, Esq., Washington, D.C., and Robert W. Haines, Esq., and Juliet Shepard, Esq., for Mobil Oil Corporation; Ernest J. Altgelt III, Esq., Carolyn S. Hazel, Esq., Merrill E. Fliederbaum, Esq., Houston, Texas, for Conoco, Inc.; Dennis E. Butler, Esq., Los Angeles, California, for Union Oil Co., of California; Robert J. Sinclair, Esq., Houston, Texas, for Aminoil Inc., Jennifer A. Cates, Esq., Bartlesville, Oklahoma, for Phillips Petroleum Company and Phillips Oil Company; Cass C. Butler, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

This is a consolidated decision of 16 appeals [1] brought by oil and gas producing companies which hold leases

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[1] The appellants, case numbers, and Minerals Management Service (MMS) file numbers of the appeals consolidated in this decision are:

IBLA 85-282	Shell Offshore, Inc.	MMS-84-0039-OCS
IBLA 85-283	Cities Service Oil and Gas Corp., et al.	MMS-84-0040-OCS
IBLA 85-284	Pogo Production Company	MMS-84-0041-OCS
IBLA 85-285	Exxon Company, U.S.A.	MMS-84-0042-OCS
IBLA 85-286	Tenneco Oil Company, et al.	MMS-84-0043-OCS
IBLA 85-287	Pennzoil Oil & Gas, Inc., et al.	MMS-84-0044-OCS
IBLA 85-288	Amoco Production Company	MMS-84-0045-OCS
IBLA 85-289	American Petroleum Institute	MMS-84-0046-OCS
IBLA 85-290	Chevron U.S.A., Inc.	MMS-84-0051-OCS
IBLA 85-291	Gulf Oil Corporation	MMS-84-0074-OCS
IBLA 85-292	Columbia Gas Development Corp.	MMS-84-0075-OCS

[Continued]

issued under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1982).[2] Pursuant to the Act, lessees are required to pay a royalty of not less than 12½ percent of the "amount or value of the production saved, removed or sold" as fixed by the Secretary of the Interior. *Id.* § 1337(a). MMS carries out the duty of the Secretary to establish the value of production. Included in the factors considered in establishing the value is the regulated price. 30 CFR 206.150. The regulated price of natural gas is set by the Federal Energy Regulatory Commission (FERC) acting under authority of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982), and the

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[1] [Continued]

IBLA 85-293	Mobil Oil Corp., et al.	MMS-84-0076-OCS
IBLA 85-294	Conoco, Inc.	MMS-84-0077-OCS
IBLA 85-295	Union Oil Company of California	MMS-84-0078-OCS
IBLA 85-296	Aminoil, Inc.	MMS-84-0079-OCS
IBLA 85-297	Phillips Petroleum Company	MMS-85-0001-OCS

By order of Feb. 7, 1985, these 16 appeals were consolidated with the appeal of Texaco, Inc., IBLA 85-281. On Apr. 5, 1985, Texaco, Inc., and the MMS entered into a Stipulation of Dismissal, and by order dated Apr. 15, 1985, IBLA 85-281 was segregated from the consolidated cases and dismissed with prejudice.

By order of Aug. 15, 1985, the appeal of Conoco Oil Co., Inc., IBLA 85-748, from May 30, 1985, decision of the Director, MMS, denying royalty refund requests resulting from FPC opinion No. 598, was consolidated with similar cases for the purposes of briefing and decision. By order of Sept. 13, 1985, the appeals of Chevron U.S.A., Inc., and Gulf Exploration and Production Company, IBLA 85-795, Shell Offshore, Inc., IBLA 85-796, and Kerr-McGee Corp., IBLA 85-797, were also consolidated for the purposes of briefing and decision. Although the consolidated cases raise a common issue of law, because those consolidated by the subsequent orders arise from different procedural and factual backgrounds, they will be ruled upon in a separate opinion.

[2] The current statutes derived from the OCSLA, P.L. 212, 67 Stat. 462, and the OCSLA Amendments of 1978, P.L. 95-373, 92 Stat. 629.

Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (1982).

I.

The appeals under consideration arise from a "final order" issued by MMS November 23, 1984, which, among other things, denied "all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981 on Federal Outer Continental Shelf (OCS) leases." 49 FR 47120 (Nov. 30, 1984). The denial was "based on the 2-year statute of limitations for royalty refund requests mandated by section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1339(a)." The order stated that it did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute."

FERC Order No. 93 established final rules applying to the sale of natural gas regulated under the NGPA. 45 FR 49077 (July 22, 1980).[3] Among the regulations promulgated was section 270.204 which established standard conditions for measuring the energy (Btu) content of natural gas for the purpose of determining its first sale ceiling price. Previously published interim rules had specified, as had regulations issued under the Natural Gas Act, that the measurement was to be made on gas "saturated with water vapor." 43 FR 56448, 56550 (Dec. 1, 1978); *cf.* 18 CFR 2.56a(c)(1)(iii), 2.56b(d)(1). The final rules retained this phrase, but the preface noted that the results obtained "must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." 45 FR 49080 (July 22, 1980). The preface also stated that section 207.204 was effective 30 days from the date of issuance. *Id.* at 49081.

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[3] Because we are concerned only with the effect of FERC's rules on royalty payments made to MMS, we do not discuss the FERC's orders and their subsequent history in full detail. A more complete explanation may be found in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*, 716 F.2d 1 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

After issuing Order No. 93, FERC received a number of applications for rehearing, primarily from oil and gas pipeline and distribution companies. FERC denied the applications for rehearing but granted requests for clarification by Order No. 93-A. 46 FR 24537 (May 1, 1981). Included in the discussion of the effective date of Order No. 93 was the statement: "Because Order No. 93 is but a clarification of the interim rule, it is effective for all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule." 46 FR 24543. Additional petitions for rehearing were filed with FERC and further administrative proceedings not of consequence here ensued. The outcome was that FERC issued an order reaffirming the December 1, 1978, effective date and adding a new subsection (c) to section 270.204. 47 FR 614 (Jan. 6, 1982). It stated: "The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." *Id.* at 615.

Although the history of FERC's orders appears to be concerned with little more than a regulatory definition, the consequences of the definition are significant. The Btu content of natural gas varies with the mixture of various combustible hydrocarbons it contains and also with its noncombustible ingredients, including water vapor. Measuring the Btu content of a sample of gas "saturated with water vapor" (commonly referred to as "the wet rule") tends to understate the actual Btu content of the gas from which the sample was taken because water is added to reach the saturation point. Since the NGPA requires that maximum first sale prices be set in terms of "per million Btu," *see* 15 U.S.C. §§ 3318, 3319 (1982), the understated energy content lowers the price paid by pipeline and distribution companies to gas producers. Conversely, the language of the preface to the final regulations and subsequently adopted section 207.204 (c) requiring adjustment of prices for the energy content of gas "actually delivered" (referred to as "the dry rule")

raises the price paid to producers. Although the difference in the Btu content of gas measured under the wet and dry rules is usually small [4] and the corresponding price difference minimal, given the large volumes of natural gas normally flowing from producers to pipeline and distribution companies, the difference quickly becomes measured in millions of dollars.

Aware of the significant effect of the dry rule, particularly the potential liability for additional royalties on gas purchased prior to the issuance of Order No. 93-A, gas pipeline and distribution companies sought judicial review of FERC's orders. In *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*, 716 F.2d 1 (D.C. Cir. 1983), the court found FERC's "dry rule to be inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique implicit in the NGPA." *Id.* at 14-15. Accordingly it vacated the "measurement of Btu content established in section 270.204." *Id.* at 16. The United States Supreme Court denied *certiorari* on March 19, 1984. 465 U.S. at 1108 (1984).

The significance of the content and history of FERC Orders Nos. 93 and 93-A for the present case is that they were used by MMS in calculating the value of production and consequently the royalties due on gas produced from leases held by appellants. Just as the higher Btu content resulting from measurements made using the dry rule would raise the maximum selling price producers would charge under the NGPA, so also it raised the amount of royalties due MMS. Conversely, recalculation of royalties due MMS under the wet rule will result in lower royalties due for gas produced or sold beginning December 1, 1978,

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[4] The effect of the wet rule was to raise the heating value of gas sold by up to 1.74 percent. Sharples & Pannill, "Calculation of Gas Heating Value is Complicated by the Courts." *Oil & Gas Journal* 47 (July 2, 1984).

and a refund to the producers. The consequence of MMS' final order under appeal is to deny refunds for royalty payments made prior to November 9, 1981, except for lessees who filed "proper notice."

II.

After receiving a number of requests for refunds from producers, on November 9, 1983, MMS issued a letter stating that because a final decision had not been rendered in the litigation, it would not accept "refund adjustments." *See* 49 FR 31779 (Aug. 8, 1984). The letter stated that FERC was seeking authority from the Department of Justice to file for *certiorari* and that MMS would establish "procedures for claiming refunds in the event that the lower court ruling is upheld." *Id.* It also advised producers who had "included FERC 93 or 93-A refund adjustments in prior MMS-2014 reports" to reverse the adjustments in their next monthly report. *Id.*

A month after the Supreme Court denied *certiorari*, MMS published procedures for applying for refunds. 49 FR 17824 (Apr. 25, 1984). Applicants were told to submit detailed information and documentation supporting their claims for refunds and, after receiving approval, submit revised MMS-2014's. Of importance to the present appeal, the instructions required a "showing that the payment for which a refund or credit is sought was made within 2 years of the request," and referred applicants to a Solicitor's opinion. *See Solicitor's Opinion,* "Refunds and Credits Under the Outer Continental Shelf Lands Act," 88 I.D. 1090 (1981) (hereinafter *Solicitor Op.*).

Over 3 months later MMS published revisions to its instructions, changing the information producers were to supply in applying for refunds and giving notice that MMS review would be conducted by audit procedures. 49 FR 31779 (Aug. 8, 1984). In a section entitled "Tolling Periods" MMS found

> the 2-year statute of limitations mandated in section 10 of the Outer Continental Shelf Lands Act (OCSLA) was tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below). For payors who submitted requests prior to that date that met the requirements of a section 10 claim under the OCSLA, the statute of limitations will be tolled as of the date the DOI [Department of the Interior] received the payor's request.

The Solicitor's opinion was again cited. The notice also set, based on a recently published FERC rule, separate dates for "the end of the tolling period" for large and small producers.[5] Finally, noting that some producers had reduced their royalty payments by the amounts they claimed due as refunds, MMS ordered them to pay the amounts deducted within 60 days, and stated that failure to do so "will be considered to be done knowingly and willfully," citing 30 U.S.C. § 1719(c)(1) (1982) and 43 U.S.C. § 1350(c) (1982).

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[5] The FERC publication referred to by MMS was notice of an interim rule under which FERC ordered large producers to make refunds to pipeline companies within 6 months and small producers to make refunds within a year. 49 FR 19293 (May 7, 1984). A producer was classified as large or small depending upon whether it had "sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983." *Id.* at 19295. Using the times set by FERC, MMS stated that the end of the tolling period was Nov. 3, 1984, for large producers and May 3, 1985, for small producers.

FERC's interim rule led to issuance of a final rule as Order No. 399. 49 FR 37735 (Sept. 26, 1984). Petitions for rehearing led FERC to stay the order and extend the deadline for refunds pending rehearing. 49 FR 43543 (Oct. 30, 1984). As a result of the petitions on rehearing, FERC revised its order by Order No. 399-A. 49 FR 46353 (Nov. 26, 1984). It also extended the deadline for large producers to Dec. 31, 1984. These orders were reviewed by the Court of Appeals for the District of Columbia over the issue of offsets which is not relevant in the present case. See *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*, 756 F.2d 166 (D.C. Cir. 1985).

Four months after publishing its revised instructions MMS issued the "final order" which is the subject of the present appeal. 49 FR 47120 (Nov. 30, 1984). It stated that MMS had received appeals from its August 8, 1984, notice establishing refund procedures, but that the agency did not regard the notice "as a final order from which an appeal may be taken." Accordingly, MMS dismissed the appeals it had received as "procedurally defective," but stated that the current "final order" could be appealed to this Board. As previously described, MMS then denied refund requests for royalty payments made before November 9, 1981. It noted that the order did not apply to lessees "who filed a proper notice with MMS which tolled the 2-year statute." "In order to have tolled the statute," MMS went on to state, "a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed," again citing the Solicitor's opinion. Finally, again based on FERC actions,[6] MMS extended the "tolling period" for large producers, but noted that the extension and the "revisions of refund criteria are not final orders for purposes of appeal."

III.

The central issue for decision in this appeal is whether MMS was correct in finding that 43 U.S.C. § 1339(a) (1982) precludes requests for refunds of royalty payments made prior to November 9, 1981. As discussed below, this issue involves questions about the application of the statute and its requirements for making refund requests.

In relevant part, 43 U.S.C. § 1339(a) (1982) provides:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this

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[6] 49 FR 43543 (Oct. 30, 1984); see note 5 *supra*.

> subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *.

In general, appellants focus on the portion of the statute regarding payments "in excess of the amount * * * lawfully required to pay." They argue that their royalty payments were lawfully required at the time they were made and did not become excess until the Supeme Court denied *certiorari* in the *Interstate* case on March 19, 1984. For this reason, they assert, it was not possible to file for a refund within 2 years of the actual date of payment because no refund was due until the Supreme Court's order. Indeed, some appellants state it was contrary to their interest to object because they received more for their production under the dry rule. In fact, numerous producers, including some of the present appellants, intervened in support of the orders in the litigation brought against FERC. For these and other reasons, they conclude that this Board should find the 2-year period provided by the statute did not begin to run until the date of accrual of their right to a refund.

Appellants also raise other arguments. Several point to various events which they contend tolled the statute either for all producers or for their own leases. Some contend that MMS's exclusion of their claims is a taking of their property in violation of the fundamental fairness requirements of the due process clause of the Fifth Amendment. A number of appellants also object to the manner in which MMS issued its notices, claiming violations of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1982).

In its answer, MMS focuses on the portion of the statute allowing repayment "if a request for repayment * * *

is filed * * * within two years after the making of the payment." It argues that under this language the 2-year period begins when payment is rendered and that the act has the effect of barring requests made once the 2-year period has run. In reply to appellants, MMS points out that they could have notified the Department of the refunds which would be due had the challenge to the FERC orders succeeded. MMS acknowledges that its letter of November 9, 1983, tolled the statute, but denies that either administrative or judicial review of the FERC orders had the same effect.

In presenting their arguments the parties cite and discuss the Solicitor's opinion referred to in MMS's notices as well as other administrative interpretations of similar statutes. The parties also argue about the applicability of this Board's decision in *Phillips Petroleum Co.*, 39 IBLA 393 (1979), and, to a lesser extent, *Shell Oil Co.*, 52 IBLA 74 (1981). No court has addressed the application of the statute in detail.[7] In considering the parties' arguments the Board has reviewed the Solicitor's opinion and examined OCSLA's legislative history.

IV.

[1] Section 1339 confers authority upon the Secretary of the Interior to approve refunds for overpayments made in regard to OCS leases and also authorizes the Secretary of the Treasury to make the payments. More precisely, it states that when the Secretary of the Interior is satisfied that an OCSLA lessee has made a payment "in excess of the amount he was lawfully required to pay," the excess "shall be repaid" if a request is filed "within two years after the making of the payment."

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[7] *See Pennzoil Offshore Gas Operators, Inc. v. Federal Power Commission*, 560 F.2d 1217, 1221 n.8 (5th Cir. 1977); *Placid Oil Co. v. United States Department of the Interior*, 491 F. Supp. 895, 900 (N.D. Tex. 1980).

Such a statute as this is needed because the United States Constitution prohibits drawing from the U.S. Treasury "but in Consequence of Appropriations made by law." U.S. Const. art. I, § 9, cl. 7, *see Reeside v. Walker*, 52 U.S. (11 Howard) 272 (1851); *Stizel-Weller Distillery v. Wickard*, 118 F.2d 19 (D.C. Cir. 1941). OCSLA requires that all sums paid on leases be deposited in the Treasury. 43 U.S.C. § 1338 (1982). Thus, absent express authority, the Secretary would be unable to order repayment of OCSLA funds deposited in the Treasury. The Department has recognized the constitutional requirement on numerous occasions. *See Solicitor Op., supra* at 1093 and cases cited in notes 3 and 4.

In *Phillips Petroleum Co., supra*, at 398, the Board recognized that one purpose of section 1339 is "to require lessees to promptly verify their accounts and ascertain the correctness of payments made within the time provided." Unfortunately, the legislative history of section 1339 reveals little else about its purpose other than to meet the obvious administrative need to provide authority to make refunds. While OCSLA's financial provisions generated considerable controversy, the debate focused more on Federal aid to education and the need to repay the national debt (proposed purposes to which income from leases would be dedicated) than the scope of the Secretary's refund authority. The summary sections of the relevant committee reports tend to paraphrase the statute rather than elucidate it. *See, e.g.*, H. Rep. No. 413, 83d Cong., 1st Sess., *reprinted in U.S. Code Cong. & Ad. News* 2177, 2182 (1953). The most helpful comment appears in the section of the Senate committee report discussing committee amendments. It states: "Section 10, providing for refunds is similar to provisions of Federal mineral leasing laws, with the additional requirement of notice to Congress in advance of repayment." S. Rep. No. 411, 83d Cong., 1st Sess. 26 (1953).

At the time OCSLA was enacted, Secretarial authority to refund payments made under the mineral leasing laws

was provided by 43 U.S.C. § 98a (1954) (Act of June 27, 1930, ch. 642, 46 Stat. 822).[8] This statute made the Act of December 11, 1919, ch. 5, 41 Stat. 366, "applicable to all payments in excess of lawful requirements." It was enacted in 1930 after the Comptroller General determined that existing statutes did not apply to mineral lease payments because the mineral leasing laws were not "public land laws." Dec. Comp. Gen. A-28366 (Sept. 5, 1929); *cf. Udall v. Tallman*, 380 U.S. 1, 19, *reh'g denied*, 380 U.S. 989 (1965). The 1919 Act permitted refunds under two provisions. First, for applications "to make any filing, location, selection, entry of proof" the Act permitted repayment of "purchase moneys and commissions" if a request was made "within two years from the rejection of such application." 41 Stat. 366 (1919). Second, the Act provided that "in all cases" a person making a payment "under the public land laws in excess of the amount he was lawfully required to pay" would be repaid provided he "file[d] a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment." *Id.* No change in wording was made by Congress in extending the statute to mineral leases. *See* 46 Stat. 822 (1930).

The chief reason for enacting the 1919 legislation was that the existing statutes did not provide a time limitation for filing for refunds. *See* Act of March 26, 1908, ch. 102, 35 Stat. 48. It appears that a time limitation was deemed necessary because enterprising lawyers were searching Departmental records to find unrefunded payments and applying for refunds on behalf of those entitled to them, frequently many years after the event

[8] The statutes in effect were repealed by the Public Land Administration Act which contained a provision authorizing refunds. P.L. 86-649, § 204, 74 Stat. 506, 507 (1960) (codified at 43 U.S.C. § 1374 (1970)). This statute was in turn repealed by section 705 (a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743, 2792-2793. The current statute is found at 43 U.S.C. § 1734(c) (1982).

which gave rise to a claim. *See Solicitor Op., supra* at 1097-98 (quoting House debate).

Comparison of section 1339 with its predecessor reveals that the language relied on by appellants "("lawfully required to pay") was adopted unchanged while the language relied upon by MMS ("two years after the making of the payment") was substituted for the reference to the issuance of a patent. While this change received some attention at the time, *see* S. Rep. No. 411, 83d Cong., 1st Sess. 37 (1953) (report of Department of the Interior) and 99 Cong. Rec. 10474 (July 30, 1953) (amendment), a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing. Nevertheless, as the present case dramatically points out, the change was significant.

The earlier statute used the date a patent issues as the date the statutory 2-year period began to run. Issuance of a patent is the final action of the Department on a public land entry and transfers title from the United States to the patentee. *Smelting Co. v. Kemp*, 104 U.S. 636 (1881). Until this event occurs, the land remains under the jurisdiction of the Department and the entry may be reviewed and cancelled. *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Kirk v. Olson*, 245 U.S. 225 (1917); *Hawley v. Diller*, 178 U.S. 476, 488 (1900). For this reason, until a patent is issued (or the entry cancelled) it is not possible to determine whether a refund is due or, if so, its amount. Thus, the earlier statute based its time period on an event which necessarily corresponded to the date of accrual of a right to a refund. *Cf.* 20 Dec. Comp. Gen. 734, 736 (1941) (quoting letter from Secretary of the Interior).

[2] The wording "making of the payment" in section 1339, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While

Congress may have intended to merely substitute an equivalent term appropriate to the OCS leasing system in order to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. *William E. Phalen*, 85 IBLA 151 (1985); *Mobil Oil Corp.*, 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. *See* 2A Sutherland, *Statutes and Statutory Construction* § 46.01 (4th ed., rev. 1984).

Nor does the 1941 opinion of the Comptroller General require a contrary conclusion. The problem the Comptroller General confronted was that Congress, in extending existing statutes to mineral leasing, also extended them to grazing leases by its use of the term "leases," but grazing leases did not fall clearly within the language of the earlier statutes. The procedures by which grazing leases were issued did not involve the payment of "purchase moneys and commissions," the rejection of an "application, entry or proof," or the issuance of a patent. *See* 20 Dec. Comp. Gen. 734, 735-36 (1941). Thus, the intent of Congress to permit refunds of amounts paid for grazing leases created an ambiguity in the earlier statutes requiring interpretation to bring them within the scope of the 1930 legislation. In contrast, the wording chosen by Congress in enacting section 1339 is not ambiguous.

Because 43 U.S.C. § 1339 (1982) constitutes a grant of administrative authority, it is necessary to reject appellants' arguments that their 2-year period did not begin until they were aware a refund was due. The refunds at issue did not become due because of the *Interstate*

ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact. MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of "the making of the payment." Accordingly, we affirm the result reached in *Phillips Petroleum Co., supra,* that under the statute a right to a refund must be asserted within 2 years of the date of payment.

Although repayment by the Secretary of the full amount of refunds sought by appellants to is not possible under section 1339, this conclusion does not foreclose other remedies which may be available to them. In this regard, the Solicitor's opinion erred in applying Departmental interpretations of the 1919 refund statutes to section 1339. The Solicitor stated: "The Department interprets the limitation to be 'obviously against the claim and not merely against the remedy.'" The language quoted appeared in instructions issued by the Department, 49 L.D. 541, 544 (1923), and was quoted in a later decision, *Anthony, Legal Representatives of Middlebrook (On Rehearing)*, 51 L.D. 333, 335 (1926). While the statement may have been a correct interpretation of the 1919 Act because its time limitations ran from a date corresponding to the date a refund was due, such is not the case with section 1339. If applied to section 1339 and the present case, such an interpretation would dictate a finding that some of appellants' overpayment claims were extinguished prior to the date their payments became refundable following the circuit court's decision. Accordingly, section 1339 does not operate to extinguish any claims appellants may have. Nevertheless, as a practical matter, appellants may have little recourse but to petition Congress for relief.

V.

Next, the issue of the manner of making "a request for repayment" under section 1339 should be considered.

Appellants raise both general and specific arguments as to the manner in which MMS has handled requests for refunds and issued the notices described in Part II. In general, they contend the notices impose substantive and procedural rules without benefit of the rulemaking procedures mandated by the APA. *See* 5 U.S.C. § 553 (1982). For this reason, they maintain the notices, particularly the "final order," are invalid. Appellants' specific arguments concern several matters stated in the notices. They object to the dismissal of their appeals as "procedurally defective" in the notice of August 8, 1984, and point out that MMS nevertheless addressed the substance of the arguments raised in those appeals. They argue that the "tolling" determination under which MMS denied refund requests for payments made prior to November 9, 1981, is a substantive rule affecting their right to obtain refunds. They also object to the use of notices to establish the specific information which must be submitted to MMS to obtain a refund.

An additional point raised by appellants is both part of their general argument and a specific objection. As was previously observed, MMS's notices referred to a Solicitor's opinion in regard to the 2-year time period for requests made under section 1339, and its "final order" again referred to the opinion in stating its decision did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute." 49 FR 47120 (Nov. 30, 1984). Appellants argue that through these references MMS has imposed a substantive requirement regarding requests for refunds without proper rulemaking under the APA. They point out that a Solicitor's opinion is simply a legal opinion given by the Solicitor to the Secretary and argue that the standards it states are not derived from the statute. Nevertheless, they claim, MMS is applying the standard established by the Solicitor not only to their requests but also to all refund requests made to MMS. They additionally argue that the standards so set cannot be applied without publication

in the *Federal Register* as required by 5 U.S.C. § 552(a) (1982).

To substantiate their arguments, several appellants have submitted copies of documents which they maintain constitute valid requests to the agency. For example, by letter dated September 3, 1983, Union Oil Company of California submitted to MMS reports for payment of its royalties due and enclosed a "Notice to Interest Owners."[9] The letter also asserted Union's position that the notice met the statute's 2-year requirement. The Union notice referred to the circuit court ruling and noted that it would result in a lower maximum lawful price of under 2 percent. Contingent upon the circuit court decision being upheld, it also asserted Union's intent to recover "excess amounts previously paid to you." By letter dated December 28, 1983, Union sent a copy of the notice to MMS, again asserting that it met the 2-year require-

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[9] The notice stated:

"The United States Court of Appeals for the District of Columbia Circuit (D.C. Court) issued a decision on August 9, 1983, vacating certain regulations established by the Federal Energy Regulatory Commission in Order No. 93 and Order No. 93-A. The D.C. Court's ruling, in effect, provides for a maximum lawful price slightly lower (under 2%) than that allowed pursuant to the above-mentioned Orders. Union Oil Company of California (Union) is in the process of appealing this decision.

"Union accounts to its royalty interest owners and other interest owners on the basis of actual proceeds received by Union. Subsequent to the issuance of Orders Nos. 93 and 93-A, some pipeline purchasers made additional payments in accordance therewith while other pipelines refused to make payments in accordance therewith until such time as a final non-appealable decision was reached on such issue.

"In the event that the D.C. Court's decision is upheld and only to the extent that Union is compelled to make a refund to your pipeline purchaser, Union will recover from you any excess amounts previously paid to you, plus any interest thereon, which Union is legally required to refund and which is attributable to your interest."

ment. By letter dated March 14, 1984, MMS replied that the notice did no meet the 2-year requirement of the statute "as it does not contain the data requested in paragraph three below." The third paragraph of the letter stated in part:

> To satisfy the legal basis for tolling the Section 10 Statute of Limitations your refund request should contain; (1) an estimate of the amount of refund requested, (2) the basis for the refund, and (3) the time period involved. This data must be presented in sufficient detail to allow MMS to substantiate your request.

MMS has responded by arguing that its final order is not a rule as defined by the APA, and that even if it is, it is an interpretative rule excepted from notice and comment rulemaking under 5 U.S.C. § 553(b)(A) (1982).

In relevant part the APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." 5 U.S.C. § 551(4) (1982). Applying this definition, it is clear that through its notices MMS sought to establish rules governing refund requests.[10] MMS, however, correctly argues that the APA makes exceptions from its rulemaking requirements for "interpretive rules." 5 U.S.C. § 553(b)(B) (1982).[11] Traditionally, this exception has been treated as establishing a distinc-

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[10] Although MMS asserts as a defense that its final order is not a rule, it offers no analysis or argument in support of this position. It does quote in a footnote the definition of "order" at 5 U.S.C. § 551(6) (1982).

[11] Section 553 provides two exceptions for interpretive rules. First, under subsection (b)(A) interpretive rules are excepted from the requirement to publish notice of proposed rulemaking. Second, under subsection (d) an exception is provided to the requirement that publication of a rule occur 30 days prior to its effective date.

tion between interpretive and substantive rules. The APA, however, does not define these terms and courts have made a variety of statements about the differences between the two types of rules. Of particular concern in judicial pronouncements has been the issue of whether the rule under review is binding on the court in the case before it.

[3] In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), Justice Rehnquist reviewed some of the Supreme Court's cases on the matter and outlined the steps under which judicial review proceeds. "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Id.* at 301. A substantive rule is one " 'affecting individual rights and obligations.' " *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). Because the legislative power of the United States is vested in Congress, if a rule is substantive, it "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* In addition,

> the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton v. Ruiz, supra*, at 232. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Id. at 303.

[4] The Secretary of the Interior is given full authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions." 43 U.S.C. § 1334(a) (1982). MMS has not formally promulgated regulations govern-

ing refunds. *See* 30 CFR Part 230. Nevertheless, there is no need to determine whether MMS's notices constitute such rules and regulations within the authority of OCSLA or to delve into the complexities of the differences between substantive and interpretive rules and the concomitant questions about substantial impact. *See generally* 2 Davis, *Administrative Law Treatise* §§ 7.8 through 7.20 (2d ed. 1979 and Supp. 1982). If a rule is *substantive*, it must be promulgated in accordance with the APA in order to have the "force and effect of law." *Chrysler Corp. v. Brown*, *supra*. Nothing in the notices issued by MMS indicates that they were published pursuant to the notice and comment rulemaking procedures described by 5 U.S.C. § 553 (1982). Thus, they cannot have the force and effect of law. The same is true if, on the other hand, the notices are *interpretive* rules. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Id.* at 315.

If the question presented was whether MMS had authority to determine what information it needed in order to process refund requests, as in its notice of April 8, 1984, it is unlikely we would have difficulty concluding that it has such authority. If the next question was whether MMS could publish a list of the necessary information in the *Federal Register*, we would agree that it can and point out that such publication may be required by 5 U.S.C. § 552(a) (1982). Similarly, it would seem apparent that MMS may determine that it does not need all the information it first thought necessary, modify its list, perhaps adding different information, and publish a notice, as MMS did in its notice of August 8, 1984. Whether these decisions are to be termed administrative matters, procedural determinations, or interpretive rules is generally of little consequence. They do not have the force and effect of law in the sense that substantive rights of parties cannot be affected. An application for a re-

fund need not be approved until sufficient information has been supplied, but the rejection of an application would not prejudice the substantive rights of the applicant to obtain a refund. It would simply need to submit the information needed to support its request. Of course, such procedures cannot be administered in a manner that is otherwise not in accord with the law, but such issues are of no concern here.

The gravamen of appellants' complaints is that MMS has viewed its notices and the Solicitor's opinion as having substantive effect on appellants' claims to refunds. From the example of Union Oil Company's letter and notice it is clear that MMS views the standards drawn from the Solicitor's opinion as substantive requirements governing requests for refunds even though MMS's response failed to state why the company's submission was deemed insufficient. MMS's notices are not a substitute for promulgated regulations; nor can the Solicitor's opinion be given such weight. By its notices MMS announced the manner in which it would review, and has reviewed, requests for refunds, but neither its notices nor the Solicitor's opinion can limit the rights of parties or control review by this Board. *See* 43 CFR 4.1; *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664-65 (D.C. Cir. 1978); *Northern California Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976). To the extent MMS has sought by the publication of its notices to impose substantive consequences upon appellants' claims to refunds, these determinations must be reexamined by the agency. Because MMS's final order did not address the specific requests raised by appellants, we do not consider these refund requests to be ripe for review. Since this matter must be remanded to MMS for further action, upon reconsideration by the agency and the issuance of specific decisions further appeal to this Board may be appropriate.

[5] Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 itself. The Solicitor's opinion previously cited is correct in concluding that because section 1339 states a request is to be "filed," it must be made in writing. However, there is no language in the statute indicating the form the writing must take or specifying its substantive contents. The word "request" does not entail any substantive requirements. If Congress intended anything in adopting the term from the earlier statute, it is likely it had in mind overpayments resulting from computational errors and the use of estimates in making payments, and it assumed the Department would establish forms and promulgate procedures for supplying the accounting information necessary to obtain refunds. *Cf.* 43 CFR 217 (1949 and Supp. 1953). If Congress had wished, it could have written specific requirements into the statute. Instead, it appears to have left the matter to the Department and the only affirmative requirement indicated by the statute is that some form of written request is required. Undoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating "I want a refund;" however, the statute does not limit the form a request may take. While in the normal course of business notice would likely be given by letter, the statute does not specify a particular type of document. Thus, in reviewing appellants' cases, MMS should consider whether other documents received from lessees provided notice that the submitting party desired a refund. In addition, we find that there should be minimum requirements for making refund requests; future requests arising after the date this opinion issues should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought.

The notice necessary to meet the 2-year provision of the statute must be distinguished from the proof necessary to substantiate a request. MMS has administrative

and fiscal responsibilities to assure itself that a refund is permitted by law and that the applicant is in fact entitled to a refund. As stated in section 1339, MMS must be satisfied that a party has made payment "in excess of the amount he was lawfully required to pay." Clearly it is lawful to place on a claimant both the legal and evidentiary burdens of showing entitlement to a refund. It does not follow, however, that such a burden must be met at the outset by a request filed to meet the statute's 2-year limit. A request must timely notify MMS that a party seeks a refund. In contrast, proof of a valid claim must be sufficient to allow MMS to meet its responsibility to satisfy itself that a refund is due. As in the present case, such proof may ultimately require both resolution of legal issues and submission and review of detailed records on the payments made on production from numerous wells.

VI.

The Secretary's authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions," 43 U.S.C. § 1334(a) (1982), support the promulgation of regulations establishing procedures for filing refund requests. Fundamentally, it may be said, the present cases arise because MMS had not promulgated rules for filing notices and making applications for refunds. Nor has it since. Given the absence of any controlling regulations, it is necessary to specify the manner in which the parties should proceed upon remand. Because section 1339 states that requests must be filed "within two years after the making of the payment," it was clearly improper for MMS to attempt to prevent producers from filing refund requests by announcing it would not accept such requests. Apparently in recognition of the fact its letter of November 9, 1983, may have prejudiced producers' rights, MMS sought to remedy its error by finding the letter had "tolled" the statute. While "tolling" was not the proper term to use, because MMS does not deny that

the producers may obtain refunds for overpayments made on or after November 9, 1981, we will construe its letter as an acknowledgement of notice that as a result of the circuit court decision in *Interstate* all producers would seek refunds. Accordingly, refunds may be obtained for overpayments made on or after November 9, 1981. Producers who believe they filed notice with MMS prior to November 9, 1983, and are therefore entitled to a refund for overpayments made prior to November 9, 1981, should submit to MMS documentation establishing the fact. The producer should also submit an application showing its entitlement to a refund by providing the data required by MMS in its published notices. MMS' determinations of producers' applications shall be made by written decisions appealable through the ordinary appeals process. In the future MMS should not attempt to foreclose lessees' attempts to file refund requests.

MMS' "final order" also stated that those appealing "should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision." 49 FR 47120 (Nov. 30, 1984). Several appellants have objected to this language or made requests to be permitted to later supply additional information because of the limited time for gathering it within the decline for filing a notice of appeal. It is unclear why the statement was included in the final order. The information described was not necessary to the resolution of the legal issues presented the Board by MMS's decision. It would seem beyond question that appellants paid royalties as required by MMS based on its calculations using FERC Orders Nos. 93 and 93-A. Nor is it clear what was meant by "a schedule of the royalty payments." Presumably this was intended to require more than just a list of the dates payments were made. In any event, it is not our task to conduct initial review of such information. After MMS has examined the data and documentation supplied by producers in support of their refund requests and has

made a decision as to the amount a producer is entitled to receive, and after MMS appeal procedures have been followed, then an appeal may be brought to us. At that time we would review the information to resolve any issues presented to us. Because the requirement stated in the final order was unnecessary, appellants are not to be prejudiced by any information supplied or the absence of such information in presenting their appeals to this Board.

Accordingly, all other arguments of the parties having been considered, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

/s/ Franklin D. Arness
FRANKLIN D. ARNESS
Administrative Judge

I concur:

/s/ Wm. Philip Horton
WM. PHILIP HORTON
Chief Administrative Judge

I concur in the result:

/s/ Kathryn A. Lynn
KATHRYN A. LYNN
Administrative Judge
Alternate Member

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

April 21, 1987

IBLA 85-282 thru 85-297

SHELL OFFSHORE, INC. ET AL.

MMS

Royalty Refund Requests

Motion Denied

ORDER

On April 1, 1987, Minerals Management Service (MMS) filed a motion seeking deletion or change of two sentences in the decision in *Shell Offshore, Inc.*, 96 IBLA 149, 94 I.D. —— (1987). The MMS motion explains that the phrase "refund adjustments" used in the MMS letter dated November 9, 1983, which is referred to in the *Shell* opinion, was not intended to stop producers from filing refund requests, but was intended solely to prevent them from taking credits for claimed royalty overpayments before such action could be approved by MMS. The relevant paragraph in MMS's letter of November 9, 1983 states:

> Until such time as a final order has been issued in the case, the Minerals Management Service (MMS) will not accept FERC Order 93 of (sic) 93A refund adjustments. MMS will notify payors of a final legal decision when it is rendered and provide specific instructions on procedures for claiming refunds in the event that the lower court ruling is upheld. Any Payor who has included FERC 93 and 93A refund adjustments in prior MMS-2014 reports, should reverse the adjustments in next month (sic) report.

43 FR 31779 (Aug. 8, 1984).

Pogo Producing Company and Pennzoil Company have opposed MMS's motion arguing that the explanation of intention now furnished by MMS is merely self-serving and a *post hoc* rationalization of the meaning of the November 9 letter. These producers contend that the plain language of the November 9 letter not only permits but requires the interpretation given to the quoted language by the Board's decision at 96 IBLA 175, 176.

The term "refund adjustments" does not appear in 43 U.S.C. § 1339 (1982). In the context of the MMS letter, the statement that MMS will not accept "refund adjustments" is followed by a sentence stating that MMS will notify producers and provide instructions for claiming refunds if the judicial decision on which refund claims were based is upheld. As Pogo and Pennzoil point out, the plain import of these words is that MMS did not wish producers to claim refunds until after the litigation was ended and refund procedures were established by MMS. This meaning is further indicated by MMS's finding, stated in the Federal Register notice in which the November 9 letter was printed as an appendix, that the two-year limitation provided by section 1339 was "tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below)." While the last sentence of the paragraph quoted above from the November 9 letter states that producers who made "refund adjustments"

were to reverse them, the suggestion that this credit cancellation was the only purpose of the November 9 letter is inconsistent with the finding that the statute was "tolled". Although it is possible that MMS had such a single purpose in mind, that purpose was not clearly expressed. The agency must therefore bear the consequences of the ambiguous language used by its November 9, 1983, letter. The motion to amend the *Shell Offshore* opinion is denied.

/s/ Franklin D. Arness
FRANKLIN D. ARNESS
Administrative Judge

We concur:

/s/ Wm. Philip Horton
WM. PHILIP HORTON
Chief Administrative Judge

/s/ Kathryn A. Lynn
KATHRYN A. LYNN
Administrative Judge
Alternate Member

APPEARANCES:

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APPENDIX D

UNITED STATES DEPARTMENT
OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Reston, Va. 22091

Nov. 9, 1983

Dear Payor:

Please be advised that a final decision has not yet been rendered in the case of *Interstate Natural Gas Association of America, et al. v. Federal Energy Regulatory Commission.* Although the D.C. Circuit Court of Appeals denied a Petition for Rehearing in the case, a Final Order has not yet been issued. In addition, the FERC has directed its Solicitor's Office to request authority from the Department of Justice to file for *Certiori* from the Supreme Court.

Until such time as a final order has been issued in the case, the Minerals Management Service (MMS) will not accept FERC Order 93 or 93A refund adjustments. MMS will notify payors of a final legal decision when it is rendered and provide specific instructions on procedures for claiming refunds in the event that the lower court ruling is upheld. Any Payor who has included FERC 93 or 93A refund adjustments in prior MMS-2014 reports, should reverse the adjustments in next months report.

Thank you for your cooperation on this matter. If you have any questions, please contact the Lessee Contact Branch of the Minerals Management Service at 303-231-3288.

Sincerely,

/s/ Robert E. Boldt
ROBERT E. BOLDT
Associate Director
for Royalty Management

Federal Register—Vol. 49, No. 81
Wednesday, April 25, 1984—Notices

[17824]

Refund Procedures

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice.

SUMMARY: The U.S. Supreme Court recently refused to review the lower court decision in *Interstate Natural Gas Association of America et al v. The Federal Energy Regulatory Commission* thereby invalidating the application of FERC Orders 93 and 93A.

As a result, certain payors of royalties on Federal and Indian leases may be due refunds of a portion of royalties paid on natural gas for the period from December 1, 1978, to December 8, 1983. The purpose of this Notice is to provide information to royalty payors about the procedures MMS will use to process refunds for these cases.

FOR FURTHER INFORMATION CONTACT:

Mr. Milton Dial, Chief, Royalty
Compliance Division, FTS 326-3011
(303) 231-3011

Mr. James Detlefs, Deputy Division
Chief, Fiscal Accounting, FTS 326-3282
(303) 231-3286.

SUPPLEMENTARY INFORMATION: The refund process will consist of a two-step procedure; the first part to validate the claim for a refund; the second part the submission of adjustment lines to effect the actual refund.

Each applicant for a refund will submit the information for Part I of the refund process in the following format:

1. A schedule providing by production month: a. The royalty paid to MMS. b. The royalty due. c. The royalty overpaid (a-b).

2. A schedule for each production month showing, by lease and well, the calculation of the incorrect royalty paid (including adjustments and corrections) and the calculation of the correct royalty. As a minimum, the schedules should provide the following for each calculation:

a. Category of gas/NGPA section.

b. Gas volumes and pressure base.

c. Btu for reported pressure base.

d. Water vapor content used in calculation.

e. Calculation of the gas prices (NGPA base price for reported pressure base x Btu adjustment factor $\pm$ gathering).

f. Royalty value of the gas.

g. Royalty rate.

h. The royalty paid/due MMS.

i. The date royalty was paid.

j. The net royalty overpayment.

3. Documentation that the gas purchaser(s) has/have been reimbursed for the decrease in gas value.

4. For Outer Continental Shelf leases, information showing that the payment for which a refund or credit is sought was made within 2 years of the request. Applicants are referred to Solicitor's Opinion M-36942, 88 Int. Dec. 1090 (1981).

Following review of the material submitted above, the applicant for approved refund will be notified to submit a refiling of MMS Form 2014 (Report of Sales and Royalty Remittance) for the period covered by the refund request. Specific instructions will be given to each payor at this time on how revised MMS Form 2014 is to be submitted.

Part I of the application for refund is to be submitted to: Chief, Royalty Compliance Division, P.O. Box 25165, Denver, Colorado 80225.

Part II of the application for refund relating to adjustment lines is to be submitted to: Chief, Accounting Operations Division, P.O. Box 25165, Denver, Colorado 80225.

Instructions for the preparation and submission of Part II will be provided to individual payors upon the review of materials submitted in Part I.

Special instructions for submission of Part II will be issued to those payors who submit their MMS 2014 report in a tape format.

Note.—These procedures apply to all royalty payors except El Paso Natural Gas Company. Special refund procedure instructions will be issued to El Paso Natural Gas, since it has not yet converted to the Auditing and Financing System.

Robert E. Boldt,
Associate Director for Royalty Management.

April 18, 1984.

[FR Doc. 84-11081 Filed 4-24-84: 8:45 am]

Federal Register—Vol. 49, No. 154
Wednesday, August 8, 1984—Notices

[31779]

Minerals Management Service

Refund Procedures and Order to Pay Royalties

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of Refund Procedures and Order to Pay Royalties.

SUMMARY: The purposes of this notice are to revise the Department of the Interior's Notice of Refund Procedures published in the Federal Register on April 25, 1984, and to require payors who have already deducted the amount to be refunded from their existing royalty obligations to repay that amount within 60 days.

FOR FURTHER INFORMATION CONTACT:

Mr. Milton Dial, Chief, Royalty Compliance Division, FTS 326-3011
(303) 231-3011

Mr. James Detlefs, Acting Chief, Fiscal Accounting Division, FTS 326-3281
(303) 231-3281.

SUPPLEMENTARY INFORMATION: Payors of royalties on Federal and Indian leases who are due refunds as a result of the Supreme Court's decisions in *Interstate Natural Gas Association of America, et al* (INGA) *v. The Federal Energy Regulatory Commission* (FERC) have been asked to filed requests for refunds in accord-

ance with instructions provided in 49 FR 17824, dated April 25, 1984. Until a payor has complied with these instructions, it cannot be found "to the satisfaction of the Secretary" that the payor has made an overpayment. See 43 U.S.C. 1339(a) and 1734(c). No payor may take a credit against its royalty obligations for overpayments under FERC Orders 93 and 93A until these instructions are followed.

Tolling Periods

For Outer Continental Shelf leases, the Department of the Interior (DOI) finds that the 2-year statute of limitations mandated in section 10 of the Outer Continental Shelf Lands Act (OCSLA) was tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below). For payors who submitted requests prior to that date that met the requirements of a section 10 claim under the OCSLA, the statute of limitations will be tolled as of the date the DOI received the payor's request. See Solicitor's Opinion M-36942, 88 I.D. 1090, 1100-02 (1981).

The end of the tolling period will be determined using criteria established in FERC's Federal Register notice of May 7, 1984 (49 FR 19293). For large payors (those who sold more than 10 Bcf of gas in 1983), the tolling period will expire on November 3, 1984, and for small payors (those who sold 10 Bcf or less of gas in 1983), the tolling period will expire May 3, 1985. MMS may extend the tolling period to the extent FERC extends its proceedings.

Modification of Part I Submission Requirements

Submission for Part I of refund applications from payors on onshore leases whose total refund request is $25,000 or less need only provide the information requested in Items 1 and 3 of that part.

The DOI has determined that the information requested in Part I, Item 2, of DOI's April 25, 1984, notice should be changed. Instead of the information requested in Item 2, payors must provide a refund schedule denoting on a lease-by-lease basis, the following information:

(a) The sales quantity, sales value, and the royalty reported and paid to MMS on a dry, or as-delivered basis.

(b) The sales quantity, sales value and the royalty reported and paid on a saturated basis.

(c) The amount of royalty overpaid.

MMS auditors will select a sample of leases from the refund schedule for detailed audit. All necessary data regarding the sample of leases selected must be provided by the company to the MMS auditors to facilitate the audit.

All audit work including a determination of refund eligibility will be completed within 60 days of receipt of the refund schedule.

After its company-by-company review, specific instructions will be issued by MMS on how to report the refund request on Form MMS-2014.

All other requirements in DOI's notice of April 25, 1984, shall remain the same.

Order to Pay Royalties

Finally, MMS has learned that certain payors, without following these instructions, have already reduced their royalty payments by an amount equal to the refund they claim as a result of the decision in *INGA v. FERC*. This reduction of royalty payments is in violation of the lease, the regulations, and Associate Director Robert E. Boldt's letter of November 9, 1983. Any payor who has so reduced its royalty payment must repay the amount within 60 days of the date of this notice and order. MMS will then calculate the interest owed to the Government. Failure to pay royalty within the time set in this order will

be considered to be done knowingly and willfully. See 30 U.S.C. 1719(c)(1) and 43 U.S.C. 1350(c).

Dated: July 25, 1984.

Robert E. Boldt,
Associate Director for Royalty Management.

Appendix

November 9, 1983.

Dear Payor: Please be advised that a final decision has not yet been rendered in the case of *Interstate Natural Gas Association of America, et al. v. Federal Energy Regulatory Commission.* Although the D.C. Circuit Court of Appeals denied a Petition for Rehearing in the case, a Final Order has not yet been issued. In addition, the FERC has directed its Solicitor's Office to request authority from the Department of Justice to file for *Certiori* from the Supreme Court.

Until such time as a final order has been issued in the case, the Minerals Management Service (MMS) will not accept FERC Order 93 of 93A refund adjustments. MMS will notify payors of a final legal decision when it is rendered and provide specific instructions on procedures for claiming refunds in the event that the lower court ruling is upheld. Any Payor who has included FERC 93 or 93A refund adjustments in prior MMS-2014 reports, should reverse the adjustments in next month report.

Thank you for your cooperation on this matter. If you have any questions, please contact the Lessee Contact Branch of the Minerals Management Service at 303-231-3288.

Sincerely,

Robert E. Boldt,
Associate Director for Royalty Management.

[FR Doc. 84-20949 Filed 8-7-84; 8:45 am]

Federal Register—Vol. 49, No. 232
Friday, November 30, 1984—Notices

[47120]

Minerals Management Service

Final Order on Royalty Refund Requests Resulting from FERC Orders 93/93A

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final Order on Royalty Refund Requests Resulting from FERC Orders 93/93A.

SUMMARY: The purpose of this notice is to issue a final order by the Director of the Minerals Management Service, appealable to the Interior Board of Land Appeals (IBLA), on certain royalty refund requests made as a result of the decision in *Interstate Natural Gas Associate of America et al. v. FERC.*

FOR FURTHER INFORMATION CONTACT:

Mr. Milton Dial, Chief, Royalty Compliance Division, FTS 326-231-3011, (303) 231-3011

Mr. James Detlefs, Chief, Fiscal Accounting Division, FTS 326-3281, (303) 231-3281

SUPPLEMENTARY INFORMATION: As a result of *Interstate Natural Gas Association et al. v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. den.*, 104 S. Ct. 1616 (1984), MMS has determined that certain payors of royalties on Federal and Indian leases are eligible to request refunds of a por-

tion of royalties paid on natural gas for the period from December 1, 1978, to December 8, 1983.

I. Final Order

The Department of the Interior has received a number of appeals from its August 8, 1984, notice of refund procedures and order to pay royalties (49 FR 31779).

The MMS does not view the August 8, 1984, notice on tolling period as a final order from which an appeal may be taken. Therefore, all appeals of the tolling period filed on the August 8, 1984, notice are dismissed as being procedurally defective. (The order to pay royalty in that notice was a final order.) The Director of the MMS has now issued this final order, from which an appeal may be taken to the IBLA, on certain FERC Orders 93/93A royalty refund requests.

Through this order MMS denies all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981, on Federal Outer Continental Shelf (OCS) leases. This final Director's order is based on the 2-year statute of limitations for royalty refund requests mandated by section 10 of the Outer Continental Shelf Lands Act (OCSLA) 43 U.S.C. 1339(a). The order does not apply to any lessee who filed a proper notice with MMS which tolled the 2-year statute. (See Sol. Op. M-36942, 88 I.D. 1090, 1100-1102 (1981)).

Arguments made by various payors which claim that the 2-year period has not run against their refund requests can be summarized as either disputing the time at which the 2-year period began or contending that some subsequent event tolled the statute. The MMS has considered the issues and has concluded that the clear language of section 10 mandates that the 2-year period commence upon the receipt of payment by DOI or its administering agencies or bureaus. The day of "payment"

in section 10 cannot be read to mean "the day on which a payment became an overpayment." This position was upheld in *Phillips Petroleum Co.*, 30 IBLA 393, 397 (1079).

In order to have tolled the statute during the judicial resolution of FERC Orders 93/93A, a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed. See Sol. Op. M-36942, 86 I.D. 1090 (1981). A payor may not *post facto* toll the statute by waiting judicial resolution to notify the Department.

Those payors wishing to appeal this final decision to the IBLA should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision pursuant to section 10 of the OCSLA.

II. Notice of Extension of Tolling Period and Revision of Refund Criteria

The MMS will accept documentation showing that refunds have been paid on the non-royalty portion of the claim as sufficient to justify a refund of royalties paid under FERC Orders 93/93A for the royalty portion. Documentation of the non-royalty portion should follow the format required in the MMS' previous Federal Register notices of August 8 and April 25, 1984.

The MMS will also honor the extension given to large first sellers by FERC in its "Order Granting Stay and Rehearing for the Purpose of Further Consideration," issued October 24, 1984, and may honor subsequent extensions granted by FERC. The October 24 extension will change the end of the MMS' tolling period for claims under section 10 of the Outer Continental Shelf Lands Act, as amended, from November 9, 1984, until FERC issues a final order on the merits of the petitions for rehearing. This extension of tolling period and revisions

of refund criteria are not final orders for purposes of appeal.

Dated: November 23, 1984.

William D. Bettenberg,
Director, Minerals Management Service.

[FR Doc. 84-31413 Filed 11-29-84; 8:45 am]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Oct. 12, 1972

Memorandum

To: Director, Geological Survey

From: Assistant Solicitor—Minerals
Division of Public Lands

Subject: Proposed Vermillion Block 14 Field Unit Agreement, Offshore Louisiana

By memorandum of September 27, 1972, you requested that we review the conclusions reached in our memorandum of May 25, 1972. In that memorandum we responded to an informal request concerning issues which had developed due to the retroactive aspect of the proposed unit agreement. Among other conclusions we stated that Section 10 of the Outer Continental Shelf Act (43 U.S.C. § 1339) would be applicable.

Since the date of that memorandum we have had an opportunity to examine the circumstances surrounding the unit agreement more fully and to review our conclusion with respect to the applicability of section 10. This reexamination has not changed our opinion that section 10 is applicable to the refunds or credits which will become necessary upon final approval of the unit agreement. The potential effect of section 10 is to impose the requirement of a report to Congress and the requirement that claims for a refund must be presented within two years from the date of payment.

Section 10(b) provides that no refund or credit shall be made until after the expiration of 30 days during which

Congress is in session following the submission of a report to Congress concerning the proposed refund or credit. Since the refund involved will be in the magnitude of half a million dollars it is our opinion that a report of these credits against future royalty payments should be made to Congress.

One of the conclusions reached in the memorandum of May 25, 1972, was that the two year statute of limitation contained in section 10(a) could in the absence of special legislation prevent the refunding of excess amounts which had been paid to the United States more than two years prior to the request for refund. This conclusion was based upon a literal reading of section 10(a) which provides that when a person has made a payment "in excess of the amount he was lawfully required to pay, such excess shall be repaid . . . if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment." This prior interpretation of section 10, although it might seem to be based upon the exact words of the statute, led to an unreasonable result which is not required by the statutory provision. At the time the payments were received, they were not in excess of what the lessee was lawfully required to pay. Until such time as the proposed unit agreement is approved by all the necessary parties, there will exist no excess payment which will be subject to reimbursement by refund or credit. It would be unreasonable to require a lessee to file a request for repayment within two years of date of payment when at that time neither the amount nor even the existence of an overpayment could be determined. Strictly speaking, the overpayment will only come into existence upon approval of the unit agreement, and it is the date when the overpayment comes into existence from which the statute of limitations is measured rather than the date on which the lessee paid certain money which only subsequently became an overpayment. Accordingly it is our view that the two-year limitation has not commenced to run.

Not only is this a reasonable interpretation of section 10, but it is also supported by a ruling of the Comptroller General in an opinion relating to refunds and credits arising from excessive royalty payments paid during a period in excess of two years before refund was sought. That opinion evolved after the decision in *Shell Oil Co. et al.*, 70 I.D. 393 (1963), wherein it was held that barging costs were a relevant factor to be taken into account in computing the royalties due. As a result of that decision a report was sent to Congress outlining the refunds which were due to the various lessees. Senator Jackson, Chairman of the Committee on Interior and Insular Affairs, referred the matter to the Comptroller General who responded with Opinion B-156603, dated November 5, 1965, in which he concluded: ". . . While it thus might be suggested that the claim is barred by the statutory two year limitation we would not be inclined to question the refund, since the initial payments to which it relates were paid over a number of years under protest and the claim was, in fact, filed within two years of the date of the departmental determination under which it became allowable . . ." [1] Also it should be noted that the opinion stated that when refunds are to be effected through credits against future royalty payments, Congress should be informed pursuant to section 10(b).

It is our conclusion that reimbursements which become due after the approval of the unit agreement can be effected if claimed within the two year period following that approval through the use of credits against future royalty payments and that a report must be made to Congress stating the name of the person to whom the credit is to be made, the amount of such credit, and a

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[1] The tender of payment under protest does not distinguish the Comptroller General's opinion from this case. Protest was made unnecessary by the understanding that the unit agreement would have a retroactive effect. Also there is no basis for protest in this case until the final equities are settled.

summary of the facts upon which it has been determined that a credit is due.

/s/ Frederick N. Ferguson
FREDERICK N. FERGUSON

APPENDIX E

COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

[SEAL]

B-156603 Jul. 8, 1974

The Honorable Henry M. Jackson, Chairman
Committee on Interior and Insular Affairs
United States Senate

Dear Mr. Chairman:

This is in response to your request that we review the matters outlined in the report of March 1, 1974, from the Under Secretary of the Interior to the President of the Senate concerning the application submitted to the Department of the Interior (Interior) by Union Oil Company of California (Union) for credit against future royalty payments. Your request also anticipated our review of the Acting Secretary's response to the additional questions raised by you concerning the basis for Interior's determination that Union was entitled to credit totaling $799,747.86 for overpayment on certain Outer Continental Shelf (OCS) leases.

The claimed overpayments allegedly represented excess royalty payments that Union made on certain specified OCS leases during the period from July 1, 1966, to December 3, 1972. Prior to approval of the Unit Agreement on November 15, 1973, the Federal and State leases were credited with approximately 98 percent and 2 percent respectively of the total gas produced, whereas the Unit Agreement provides for an allocation of 96.5032 percent to six Federal OCS leases and 3.4968 percent to four Louisiana State leases retroactive to July 1, 1966. Consequently, Interior determined that Union is entitled to credit for overpayments made to the United States on the basis of the original allocation, although Union's

initial request for a refund of $852,197.61 was recalculated by Interior and reduced to the present sum of $799,747.86.

As stated in the Under Secretary's letter of March 1, 1974, section 10(a) of the Outer Continental Shelf Lands Act, approved August 7, 1953, ch. 345, 67 Stat. 469, 43 U.S.C. 1339(a), authorizes the Secretary to repay amounts paid in connection with a lease issued under the Act when he determines such payment to have been in excess of the amount the lessee was lawfully required to pay, provided that the request for refund is filed within two years of the date of payment. Although the latter proviso might seem to bar allowance of that portion of Union's claim relating to payments made more than two years prior to July 27, 1973, the date Union applied for the refund credit, our decision of November 5, 1965, B-156603, supports a contrary result.

In that case the Interior Department had determined that several oil companies were entitled to refunds on account of excess royalty payments made under certain OCS oil leases. The claimed refunds related to royalty payments made by the companies under protest against administrative determinations that no deductions for barging costs from the lessor's royalty interest would be permitted in computing the royalty that was due. Thereafter, the Interior Department concluded that reasonable barging costs could, in certain circumstances, be considered for purposes of computing royalties due the United States. Within two years thereafter one of the companies submitted a claim for the refund of the resulting excess royalty payments, although these payments were originally made more than two years prior to submission of the claim. In that decision we said the following in regard to the two-year limitation:

> "The only other aspect of the Phillips claim which bears further comment is the fact that it was not submitted until January 26, 1965, covering exces-

sive royalty payments during the period October 1956 to April 1960. As you know, subsection 10(a) of the act requires requests for repayment of excessive royalty payments made to be filed within two years after making the payment. While it thus might be suggested that the claim is barred by the statutory two year limitation we would not be inclined to question the refund, since the initial payments to which it relates were paid over a number of years under protest and the claim was, in fact, filed within two years from the date of the departmental determination under which it became allowable. Moreover, we understand that the royalty payments subject to protest on the barging cost question were held in suspense by the Department and not treated as earned during the lengthy period taken for ultimate resolution of the matter."

The primary basis for the conclusion reached in our decision of November 5, 1965, thus was the fact that the claim was filed within two years of the date upon which it could first be determined that excess royalty payments had, in fact, been made. Similarly, in the instant case Union's application was filed within two years of the date the Unit Agreement was approved, and it was only at this time that the amount or, for that matter, even the existence of an overpayment became known.

Consequently, in view of the information contained in the Under Secretary's letter of March 1, 1974, we see no objection to the Under Secretary's determination that Union is entitled to $779,747.86 as credit against future royalty payments.

As regards our review of the Acting Secretary's response to the four questions subsequently directed to him, we have informally been advised that both you and your Committee are interested only in our analysis of the legal issues involved, as opposed to a full review which would include our independent vertification of the actual dollar

amounts as well. Therefore, our analysis is limited to the Acting Secretary's response to question 2 which is stated in your letter of March 13, 1974, as follows:

> "What is the authority for making the allocation change retroactive? Why did you decide to apply the change retroactively?"

Although the Acting Secretary's response thereto treats the question as having two distinct parts requiring two separate answers, our analysis of the legal issues involved considers the matter as a whole, since the basis for the decision to apply the change retroactively is closely related to and dependent upon the legal authority for doing so.

Section 5 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1334, states the following in regard to unit agreements and the reduction of rentals or royalties:

> "Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of losses, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production."

Also, as stated in the Acting Secretary's response, 30 C.F.R. 250.50 provides as follows in regard to unitization, pooling, and drilling agreements:

> "Such agreements may be initiated by lessees or where in the interest of conservation they are deemed necessary they may be required by the Director."

The Acting Secretary's response to question 2 also contained the following excerpts from the memorandum dated May 25, 1972, that was written by the Assistant Solicitor, Minerals Division of Public Land, in regard to the Unit Agreement in question:

> "Examination of the record indicates that this situation has come about by virtue of a letter dated March 29, 1967, from the Regional Supervisor, Gulf Coast Region, to Pan American Petroleum Corporation. In that letter, the Regional Supervisor in effect directed that the unit agreement would be entered into and would be effective as of July 1, 1966. We are unaware of any explicit legal authority which authorizes the Regional Supervisor to take such action.
>
> "Similarly, there does not appear to be any specific statutory or regulatory authority for the retroactive approval of unit agreements. However, the Secretary is given broad authority with respect to unit agreements, and the only statutory limitation on that authority is that any such agreement must be 'in the interest of conservation.' "

Under the provisions of 43 U.S.C. 1334, as amplified by 30 C.F.R. 226.8, only the Secretary of the Interior or his duly authorized representative can approve a unit or cooperative agreement. Since the Secretary apparently never made such a delegation of authority to the Regional Supervisor, it would appear that the Regional Supervisor had no legal authority to approve unit agreements. However, in our opinion, the determination made by the Under Secretary of the Interior to allow Union's claim for credit against future royalty payments, which was communicated to your office in his letter of March 1, 1974, and was later reaffirmed by the Acting Secretary's response to the additional questions you raised, constitutes, in effect, a ratification and approval of the Unit Agree-

ment by a properly authorized official. See Exec. Order No. 11482, 34 Fed. Reg. 15593 (1969).

Concerning the lack of specific statutory or regulatory authority for the retroactive approval of unit agreements that was also mentioned in the quoted section of the Assistant Solicitor's memorandum, we agree that section 5 of the Outer Continental Shelf Lands Act gives the Secretary broad authority with respect to the approval of unit agreements and that the only statutory limitation on such authority is that any unit agreement must be "in the interest of conservation" in order to be approved. It should be noted that section 5 of the Act also gives the Secretary similar broad authority—"in the interest of conservation"—with respect to the reduction of rentals or royalties.

The basis for the decision to approve the Unit Agreement and the retroactive provision thereof, as well as the accompanying justification as to why such approval was in the interest of conservation and therefore proper, was stated as follows in the Acting Secretary's answer to question 2:

> "In his letter of March 29, 1967, the Supervisor acted responsibly in the interest of conservation. As indicated in the Union-Pan American letter of February 10, 1967, * * * the problem of allocating production equitably between two operators in the same field with multiple reservoirs selling gas to two transmission companies with different capacity requirements, and with two governments involved with the royalty, had reached impossible proportions. Although the reservoirs involved extended onto the state leases, * * * there was very little production from state lease wells until 1966; where as one former state lease had been producing continuously since 1960. To avoid a continued inequity to the state leases with additional Federal leases coming on stream (July 1, 1966), and to avoid the drilling of unnecessary wells

on the State leases, the State of Louisiana agreed in principle to unitization and to the retroactive provision.

"A procedure of allocation was set-up in 1967 to proportionately equate the lease ownerships through reservoirs and sales under the State's allowable system, but the procedure could not take into account the problems of State-Federal equity caused by competitive reservoirs and commingled measurement. Very basically, the reason for unitization was to provide equity among the participants with minimum costs and the reason for the retroactive feature was to correct the gross inequity which began when large amounts of new Federal lease production came on stream July 1, 1966, and could not be prorated without affixing the same unitization date."

In view of the broad statutory authority the Secretary possesses with respect to the approval of unit agreements, and considering the above-stated justification for the decision to approve the Vermilion Block 14 Unit Agreement retroactive to July 1, 1966, we would not question the validity of the Unit Agreement or its retroactive provision.

Sincerely yours,

Signed ELMER B. STAATS
Comptroller General
of the United States

DECISIONS OF THE COMPTROLLER GENERAL

(B-7631)

STATUTES OF LIMITATIONS—REFUNDS OF OVERPAYMENTS UNDER LEASES, ETC., OF PUBLIC LANDS

The general rule of construction of a statute of limitation is that the statute begins to run from the time the right of action which it covers accrues; and that when such right depends upon the happening of an event or contingency, the statute does not begin to run until the happening of such event or contingency.

The two-year period of limitation in the act of December 11, 1919, for filing claims for refunds of moneys paid to the United States under public land laws is applicable to refunds of "payments in excess of lawful requirements made * * * under any statute relating to the sale, entry, lease or other disposition of the public lands" authorized by the act of June 27, 1930, amending the 1919 act.

Where there is not involved either a rejection of application, entry or proof, or a patent issuance, the two-year period of limitation in the act of December 11, 1919, as amended by the act of June 27, 1930, for filing claims for refunds of moneys paid to the United States in connection with the disposition of public lands, begins to run from the date the excess amount is paid because of error of the claimant or administrative office, or from the date of the happening of the event or contingency which caused an originally proper payment to become in excess of that required by law.

Comptroller General Warren to the Secretary of the Interior, May 7, 1941:

There has been considered your letter of November 29, 1940, in pertinent part, as follows:

Reference is made to a departmental letter of December 14, 1939, and to the Acting Comptroller General's response of January 20 wherein it was stated that repayment of fees collected in connection with licenses issued under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended, in excess of lawful requirements, are subject to the 2-year limitation of the act of December 11, 1919 (41 Stat. 366).

Soon after the receipt of the Acting Comptroller General's letter, the Acting Director of the Grazing Service addressed an inquiry to this Department wherein, after first referring to the ruling in the letter of January 20 he asked to be advised of the point of time at which the 2-year period would start to run. * * *

While the specific inquiry contained in the Department's letter of December 14, 1939, *supra*, referred only to repayments of grazing fees, the matter is also of importance in connection with repayments of money's received under other laws, especially the mineral leasing law of February 25, 1920) (41 Stat. 437), as amended.

The provisions of law which are involved in this discussion are to be found in the act of December 11, 1919, *supra*, as extended in scope by the act of June 27, 1930 (46 Stat. 822). For convenience, the applicable parts of the former act and the entire text of the latter are here quoted:

Act of December 11, 1919:

"SEC. 1. That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the persons who made such appli-

cation, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application: *Provided*, That such person or his legal representatives shall file a request for the repayment of such purchase moneys and commissions within two years from the rejection of such application, entry, or proof, or within two years from the passage of this Act as to such applications, proofs, or entries, as have been heretofore rejected.

"SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repair to such person or to his legal representatives: *Provided*, That such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment, or within two years from the passage of this Act as to such excess payments as have heretofore been made.

"SEC. 4. That the Secretary of the Interior is hereby authorized to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

(Section 3 of the act has no bearing on the matter at hand.)

Act of June 27, 1930:

"That the provisions of the Act of Congress approved December 11, 1919 (41 Stat. L. 366), entitled 'An act to amend an Act approved March 26, 1908, entitled "An Act to provide for the repayment of certain commissions, ex-

cess payments, and purchase moneys paid under the public land laws," is hereby made applicable to all payments in excess of lawful requirements made under the Act of Congress approved February 25, 1920 (41 Stat. L. 437), and under any statute relating to the sale, entry, lease, or other disposition of the public lands.' "

It will be recalled that the 1930 act had for its purpose the extension of the provisions of the 1919 act to repayments sought under the mineral leasing act of February 25, 1920, *supra*, your office having held, in an unreported decision dated September 5, 1929, that the act of 1919 was applicable only to repayments under public land laws and not to repayments under the mineral leasing laws.

It seems clear that the 1930 act is broad enough to include cases of repayments under the Taylor Grazing Act, *supra*, for it specifically includes cases arising under any statute relating to the sale, entry, lease, or "other disposition" of the public lands. While section 3 of the act provides that "* * * the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands," the issuance of grazing privileges upon the payment of fees has been regarded as a "disposition of the public lands" within the meaning of the 1930 act. However, the latter act in itself does not control repayments but merely enlarges the scope of the 1919 act. Accordingly, any time limitation on repayments, if to be found at all, must be found in the earlier act.

An examination of the 1919 act reveals at the outset that section 1 thereof has no application to the matter at hand. It provides only for the repayment of "purchase moneys and commissions," and grazing fees can hardly be considered as coming within the accepted connotation of these terms. "Purchase moneys" are those moneys paid for the land itself in cases involving entries under the mining, isolated tract, town site, and other laws. "Commissions" are those moneys paid in connection with

public land filings which go to make up or supplement the salaries of the registers of the local land offices, or which are collected in connection with filings made direct in the General Land Office. No commissions are paid in connection with the filing of applications for grazing licenses.

A further reason for holding that section 1 is not applicable arises from the fact that it limits repayments thereunder to instances where an "application, entry, or proof has been or shall hereafter be rejected." The repayments in grazing-fee cases do not arise from the rejection of applications, for no moneys are paid until an application has been considered and allowed either wholly or in part. Furthermore, there is nothing in the procedure which follows a grazing application that is analogous to an "entry" or "proof." The moneys to be repaid are generally those involved under payments made through the mistake of the applicant or the Grazing Service.

Section 2 of the 1919 act appears clearly to be broad enough to include such overpayments, for it provides for repayments in any case where "any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay * * *."

Accordingly, it is under this section that repayments of moneys collected in excess of lawful requirements in granting cases must be made.

The difficulty in applying section 2, and which prompted the departmental letter of December 14, 1939, *supra*, arises in the construction of the proviso to the section. That provision limits the authority to make repayments to instances where application for such repayment was filed "within two years after the patent has issued for the land embraced in such payment."

Manifestly, the Congress, by the 1919 act, sought to enable persons who had made payments in excess of legal

requirements in connection with public land filings to effect the return of these payments. It is also manifest that the Congress intended to limit the period within which such repayments could validly be sought, in order that claims therefor would not arise long after the excess payments had been made. However, in attempting to apply the limitation to cases other than those wherein the filing in question contemplates the issuance of a patent, serious difficulty arises. For example, no patent is contemplated pursuant to the issuance of a grazing license. Such a license confers only a privilege to graze livestock on Federal range and does not convey any right, title, interest, or estate in or to the lands. Thus there is no point of time which is analogous to the issuance of patent and thus no point of time that can serve as the beginning of the running of the 2-year limitation period.

It might be argued that, in determining the date on which the 2-year period begins in cases involving excess payments in connection with grazing licenses, the date should be that on which there is a final vesting of whatever privilege passes by the license, such as occurs upon the issuance of patent in a case wherein the patent represents the ultimate act of the Department. This would mean that the period would start to run on the date of issuance of the license. However, this construction of the statute, while practicable in the cases involving grazing licenses, which run for only one year, would not be applicable to grazing permits which are essentially the same as licenses but which, in some cases, run for 10 years. In such a case, the date of issuance of the permit could hardly be considered as the beginning of the limitation period, for under such a ruling a repayment of any excess paid after the second year of the life of the permit would automatically be barred. The practice of issuing grazing licenses is being replaced by the issuance of permits and it is anticipated that, in the course of a year or so, many 10-year permits will be issued, so that

any interpretation of the act of 1919 should, if possible, be made to fit a permit as well as a license system.

It may also be pointed out that a construction of section 2 to mean that the 2-year period starts upon the issuance of whatever privilege or right is conferred pursuant to an application is equally inapplicable to leases issued under the mineral leasing act of February 25, 1920, *supra*. For example, leases for oil and gas issued prior to the amendment of that act by the act of August 21, 1935 (49 Stat. 674), run for 20 years, and those issued since that amendment run for 5 or 10 years and so long thereafter as oil or gas is produced in paying quantities. Oftentimes royalty or rental payments under the leases are in excess of lawful requirements, and the excesses may involve substantial sums of money. The excess payments may be the fault of the lessees in some instances, but in many instances they have resulted from a miscalculation by the General Land Office of the amount due, or through a mistake in the determination of the amount legally required. In these cases it would be equally unjust to hold that the 2-year limitation begins upon the issuance of the lease, for the excess payments oftentimes occur during the third or ensuing years of the lease. In these cases it would be convenient to hold that the 2-year period begins on the date the excess payment is made. However, this would work an injustice in cases wherein the occurrence of the excess payments could not have been determined by the payor, even with due diligence on his part, until more than two years had elapsed. Furthermore, there is no analogy between the date when an excess payment is made and the date on which a patent issues, and thus a ruling of this type would be more in the nature of legislation than interpretation.

In my opinion there is a construction that can be given to section 2 which, though not altogether satisfactory from an administrative point of view, appears to be reasonable and sensible. Both at the present time and at the

time of enactment of the 1919 act, there were collections of moneys under public land laws that can be separated into two general types, i.e., (1) those which contemplate the issuance of patents and (2) those which contemplate the conferment, by an instrument of less dignity than a patent, some privilege or interest in public land that is subject to enjoyment for a period limited by the instrument. As examples of the former, there are the homestead, mining, desert land, and isolated tract laws, and as an example of the latter, there are the potash law of October 2, 1917 (40 Stat. 297), the mineral leasing act of February 25, 1920, *supra*, the Taylor Grazing Act, *supra*, the 5-acre tract law of June 1, 1938 (52 Stat. 609), and other laws.

In connection with the first type of laws, the application of the 2-year limitation is simple and practical, and will work no hardship on any payor, for in any case arising under such laws, any payment, excess or otherwise, will have been made prior to the issuance of patent, and thus at least two years from the time of the excess payment will be available within which to apply for a repayment.

As to excess payments under the second type of laws, two constructions are possible. First, it would be possible to hold that the benefits of the repayment statute are available only in those cases which involve the issuance of a patent, and that makers of excess payments under the laws of the second type can obtain no repayments, regardless of the time within which applications therefor are filed. Manifestly, this construction would be unjust for it would serve to deprive a payor of a repayment of moneys which he may have paid in excess of lawful requirements through no mistake or lack of diligence on his part. Furthermore, it would defeat the obvious intent of Congress to insure a right of repayment to anyone who made payments under the public land laws in excess of lawful requirements.

The second construction which is possible, and which appears to this Department to be the most logical and practical of application, is to hold that, as to cases wherein patents are contemplated, the 2-year limitation applies, but that in other cases, where no patent is contemplated by the applicable statute, repayments are authorized but that there is no limitation on the time within which the repayment must be sought.

It is recognized that such a construction would leave the way open to applications for repayments of moneys that have long since been paid. However, it has the advantage of being readily applicable and it would appear to be the most logical solution of a dilemma with which this Department is presently confronted. Furthermore, it appears probable that instances of applications for repayment of moneys long since received will be exceedingly rare.

It is regretted that this Department's letter of December 14, 1939, may not have indicated the necessity of a ruling on the applicability of the 2-year limitation in the act of 1919. Your early consideration of the scope of this provision, in the light of the views herein expressed, however, will be appreciated.

As stated in the decision of January 29, 1940, 19 Comp. Gen. 668, since the grazing laws appear to be statutes making disposition of public lands within the meaning of the act of June 27, 1930, 46 Stat. 822, any refunds for payments in excess of lawful requirements authorized by the 1930 act are subject to the 2-year period of limitation provided in the act of December 11, 1919, 41 Stat. 366, which act the act of 1930 amends and amplifies. The question you now present is the time or date from which the 2-year period of limitation begins to run not only with respect to refund cases arising under the grazing laws and regulations but in all cases of refunds authorized by the 1930 law, where the two specific conditions

set forth in the 1919 act—(1) "rejection of application, entry or proof" or (2) "patent has issued"—are not involved.

It is admitted in your letter that no difficulties are experienced by your Department in cases where the rejection of an application giving rise to a refund claim is involved or where the benefit granted is by the issuance of a patent but in cases where those happenings do not occur it is stated that complications have arisen due to the uncertainty of the date from which the 2-year period of limitation should run.

It is a general rule of statutory construction that a statute of limitation begins to run from the time the right of action which it covers accrues; and that when such right depends upon the happening of an event or contingency, the statute does not begin to run until the happening of such event or contingency. *State of Louisiana v. United States*, 22 Ct. Cls. 284, 288; *United States v. Louisiana*, 123 U.S. 32, 37; *United States v. Louisiana*, 127 U.S. 182, 190; *Austin Engineering Company v. United States*, 88 Ct. Cls. 559, 562.

It is noted that under the two acts involved refunds are authorized for "payments in excess of lawful requirements made under the act of Congress approved February 25, 1920 (41 Stat. L. 437) and under any statute relating to the sale, entry, lease or other disposition of the public lands." The specific mention in this law of the act of 1920 under which leases, licenses, and permits are authorized rather than the issuance of patents, as well as the mention of the word "lease" is significant in showing the apparent intent of the Congress that the provisions of the act of 1930 should apply, also, to cases other than those in which the issuance of patents was involved. Furthermore, I find no sound basis for the view that where the refund claim does not arise by reason of the rejection of an application under section 1 of the act of 1919 it must be considered under section 2 of

said act. In the case of claims for refunds of overpayments under the grazing act and similar cases there is not involved a patent "issued for the land" such as in the cases specifically provided for under section 2 any more than there is involved a rejection of an "application, entry, or proof" such as in the cases specifically provided for under section 1. But in each of those sections the contingency designated from which the 2-year period should begin to run was that which completed the transaction on the basis of which right to refund was determinable. Hence, in considering cases brought within the 1919 act by the act of 1930, it is the contingency which is equivalent in effect—rather than similar in description—to the contingencies designated in the 1919 act that is controlling.

Generally speaking, such cases may be divided broadly into two classes:

(1) Those cases in which an excess payment is made by the applicant either because requested to do so by the administrative office or because of error on his part; and

(2) Those cases in which the payment when made was as required by law but by reason of some subsequent contingency it became in excess of that required by law.

As to the first class, since no subsequent action or contingency is required to give rise to the right to a refund —such right arising immediately when payment is made the 2-year period of limitation begins to run from the date the excess amount is paid. With respect to the second class, since the right to refund does not arise until the happening of whatever contingency may be involved, the 2-year period of limitation would begin to run from the date of such happening.

APPENDIX F

IN THE UNITED STATES COURT OF CLAIMS

Case Nos. 350-87-L
352-87-L
353-87-L
384-87-L
391-87-L
409-87-L
554-87-L
679-87-L
CONSOLIDATED

CHEVRON U.S.A. INC., *et al.*,
Plaintiffs,
v.
THE UNITED STATES OF AMERICA,
Defendant.

STIPULATION OF QUANTUM

The parties, pursuant to the Order of this Court dated July 17, 1989, hereby stipulate that the amount of refund owing to the respective plaintiffs in the instant action is as follows:

PLAINTIFF	REFUND AMOUNT
AMOCO	$ 83,867.00
CHEVRON	*
COLUMBIA	*
CONOCO	$ 66,536.00
EXXON	$2,089,184.00
MOBIL	$ 610,027.00
PENNZOIL	$1,028,219.00
PHILLIPS	$1,024,940.00
POGO	$ 859,135.00
SHELL OFFSHORE INC.	$1,029,437.00

* Amount of refund is still in dispute.

To date, defendant has been unsuccessful in reaching agreement with plaintiffs Chevron and Columbia regarding the actual amount to be refunded. Therefore, final judgment in these two cases cannot yet be entered. Defendant shall file separate stipulations in these two cases as soon as the matter of quantum is resolved. Defendant will promptly notify the Court if it becomes apparent that the trial of this issue is necessary.

Dated: November —, 1989

Respectfully submitted,

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UNITED STATES CLAIMS COURT

Case Nos. 350-87-L
352-87-L
353-87-L
384-87-L
391-87-L
409-87-L
554-87-L
679-87-L
Consolidated

CHEVRON U.S.A., INC., *et al.*,
Plaintiffs

versus

UNITED STATES OF AMERICA,
Defendant

PLAINTIFFS' AND DEFENDANT'S CORRECTED JOINT STIPULATION OF MATERIAL FACTS

Pursuant to Rule 56 of the Rules of the United States Claims Court, Plaintiffs [1] and Defendant hereby submit the following stipulation of material facts in these consolidated cases:

* * * *

6. Pursuant to FERC Order No. 93, issued July 16, 1980, and Order No. 93-A, issued April 24, 1981, the Btu content of natural gas for ceiling price purposes was measured "as delivered," that is, not under water-saturated conditions, for the period December 1, 1978, through August 9, 1983. This measurement has come to be known as the "dry rule."

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[1] The Plaintiffs are identified on the signature pages of this document.

7. The dry rule increased the maximum lawful ceiling prices applicable to natural gas pursuant to the NGPA because it eliminated the artificial assumption that gas is saturated with water. For this reason, producers could lawfully collect higher prices for the same volume of gas for the period December 1, 1978 through August 9, 1983.

* * * *

9. The Plaintiffs were required to pay royalties to the MMS for gas produced from OCS leases on the basis of the ceiling prices established and collected by Plaintiffs under the dry rule. The Plaintiffs paid royalties to the MMS for gas produced from OCS leases on the basis of the ceiling prices established and collected by Plaintiffs under the dry rule in the amounts then lawfully required. (Defendant stipulates to the preceding sentence, only for the purpose of the cross motions for summary judgment on the liability phase of this case. However, such stipulation does not affect Defendant's right to determine the actual amount of royalties paid to Defendant and the basis for the royalty payments.)

* * * *

UNITED STATES CLAIMS COURT

Case Nos. 350-87-L
353-87-L
354-87-L
391-87-L
409-87-L
554-87-L
679-87-L
CONSOLIDATED

CHEVRON U.S.A. INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

DEFENDANTS' RESPONSE TO THE PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS

In accordance with Rules 33, 34, and 36 of the Rules of the United States Claims Court, Plaintiffs [footnote omitted] hereby request Defendant to answer the interrogatories and requests for admission set forth herein within thirty (30) days, separately and fully in writing, and to produce the documents requested herein within the same time period.

* * * *

REQUESTS FOR ADMISSION

* * * *

7. That the general policy of the MMS and/or DOI at least since January 1, 1981, has been that royalty payable to the MMS on gas produced from leases in the

OCS must be based on the applicable maximum lawful ceiling price for which the gas could be sold whenever the royalty payor receives the ceiling price in the sale of the gas.

RESPONSE.

Admitted. However, defendant reserves its right to object to Interrogatory No. 7 on the grounds of relevance.

* * * *

APPENDIX G

LIST OF PARTIES REQUIRED BY SUPREME COURT RULE 14.1(b)

The following were parties to the proceeding in the United States Court of Appeals for the Federal Circuit to which this Petition applies:

Chevron U.S.A., Inc.
Pennzoil Co.
Pogo Producing Co.
Phillips Petroleum Co.
Shell Offshore, Inc.
Mobil Oil Corp.
Mobil Oil Exploration & Producing Texas and New Mexico, Inc.
Mobil Exploration & Producing North America, Inc.
Exxon Company, U.S.A., a Division of Exxon Corporation
Amoco Production Company
Columbia Gas Development Corporation
Conoco, Inc.

(Appellees below)

The United States of America

(Appellant below)

LIST OF PARENT COMPANIES AND SUBSIDIARIES REQUIRED BY SUPREME COURT RULE 29.1

The following lists all parent companies and subsidiaries (except wholly-owned subsidiaries) of each corporation on whose behalf this joint petition is being filed.

Pennzoil Co. has no parent but has the following non-wholly owned subsidiaries:

Jiffy Lube International
American Sulphur Export Corporation
Royal Filter Manufacturing Company

American Auto-Fran, Inc.
Autumn Lube, Inc.
B.N.W., Inc.
Gulf States Services, Inc.
J-Lube, Inc.
Lone Star Lubrication, Inc.

Pogo Producing Co. has no parent or non-wholly owned subsidiaries.

Amoco Production Company has no parent or non-wholly owned subsidiaries.

Shell Offshore, Inc., is a wholly-owned subsidiary of Shell Energy Resources, Inc., and has the following non-wholly owned subsidiaries:

Royal Dutch Petroleum Co.
Shell Transport & Trading

The Columbia Gas System, Inc., is the parent of Columbia Gas Development Corporation. Columbia Gas Development Corporation has no non-wholly owned subsidiary.

Exxon Corporation has no parent but has the following affiliates and subsidiaries publicly traded in the United States:

Compania Minera Disputada de las Condes S.A.
Esso Malaysia Berhad
Esso Societe Anonyme Francaise
Exxon Chemical Pakistan Limited
General Sekiyu K.K.
Imperial Oil Limited
Interhome Energy Inc.
Home Energy Company Ltd.
Scurry-Rainbow Oil Limited
Les Docks des Petroles d'Ambas
Tonen Kabushiki Kaisha

Mobil Oil Corporation is a wholly-owned subsidiary of Mobil Corporation. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation,

and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered.

Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO Holdings Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Asphalt Industries, Ltd.
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian Energy Company Limited, The
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
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Compagnie D'Entreposage Communautaire
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
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D. Muhlenbruch GmbH & Co. KG
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Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
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Depots Petroliers de La Corse (DPLC)
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Dixie Pipeline Company
Dukhan Services Company
East Japan Oil Development Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Energas S.r.l.
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Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
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Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Etablissments Bouthenet
Ets. Starck & Cie
Europetrol S.p.A.
Faavang Autoverksted A/S
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Filtros De Costa Rica S.A.
Frome-Broken Hill Company Proprietary Limited

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Fruehmesser GmbH
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Futuro Homes (N.Z.) Ltd.
Gatwick Refueling Services Limited
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
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Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
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Haniel Handel Gmbh
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Hormoz Petroleum Company
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Iraq Petroleum Pensions Limited
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Lubland Limited
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Marceaux & Cie
Matco Tankers (U.K.) Limited
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Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Meritrans S.p.A.
Mertl GmbH
Mineralol-Handels-Gesellschaft Mbh
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Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
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Societe Gabonaise de Raffinage
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Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Malienne D'Entreposage (SME)
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle pour d'Epuration des Huiles de Transformateurs - Septra
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Supreme Court, U.S.
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Nos. 91-1 and 91-34

In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 43 U.S.C. 1339(a), the Secretary of the Interior is authorized to refund certain royalty payments if a request for a refund "is filed * * * within two years after the making of the payment." The question presented in this case is whether the two-year period runs from the date the payment is made, or from a later date when the payor determines, on the basis of a judicial ruling, that the amount of the payment was incorrect.

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-8a) is reported at 923 F.2d 830. The decision of the United States Claims Court (Pet. App. 13a-24a) is reported at 17 Cl. Ct. 537. The decision of the Interior Board of Land Appeals (Pet. App. 25a-55a) is reported at 96 I.B.L.A. 149. The decision of the

[1] References in this brief to "Pet. App." refer to the appendix to the petition in No. 91-34.

Minerals Management Service (Pet. App. 64a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991. Pet. App. 1a. A timely petition for rehearing was denied on April 4, 1991. Pet. App. 10a-11a. The petitions for a writ of certiorari were filed on June 28, 1991 (No. 91-1), and July 3, 1991 (No. 91-34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331-1356, the Minerals Management Service (MMS) in the Department of the Interior leases lands under the control of the federal government on the outer Continental Shelf [2] to oil and gas producers. 43 U.S.C. 1337. Pursuant to the statute, the leases typically provide for payment of a royalty to the United States of at least 12.5% of the "amount or value of the production saved, removed, or sold." 43 U.S.C. 1337(a)(1)(A). Section 1339(a) sets forth the circumstances under which a producer may seek to recover amounts erroneously paid to the Secretary as royalties:

---

[2] Section 1331(a) defines the outer Continental Shelf as

> all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

As relevant to this case, the "lands beneath navigable waters" excluded from the outer Continental Shelf under this definition generally are lands within three miles of the coast line of each State. See 43 U.S.C. 1301(a)(2).

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953.

2. Petitioners are various oil and gas producing companies that lease federal lands on the outer Continental Shelf from MMS. In 1978, the Federal Energy Regulatory Commission (FERC) issued regulations pursuant to the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, that changed the method of measuring and valuing natural gas production. 43 Fed. Reg. 56,448. As applied to petitioners, the new regulations generally entitled them to charge a higher price for the natural gas produced under their offshore leases; accordingly, petitioners paid higher royalties to the United States. A group of natural gas purchasers sought judicial review of FERC's regulations and eventually succeeded in having them overturned. *Interstate Natural Gas Ass'n of Amercia* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*INGAA*). Accordingly, petitioners were required to refund to the purchasers the excess amounts they had charged under the invalidated FERC regulations. See *Refunds Resulting From Btu Measurement Adjustments*, FERC Order No. 399, 49 Fed. Reg. 37,735 (1984).

3. Petitioners, in turn, sought a refund from MMS of the excess royalties they had paid to the

United States while the FERC regulations were in effect. Relying on Section 1339(a), MMS generally determined that refunds were not available to the extent that petitioners sought refunds for amounts paid more than two years before they filed their refund claims. Pet. App. 64a-67a.[3] MMS relied heavily on a previously published opinion of the Solicitor of the Interior, which had concluded that the two-year period described in Section 1339(a) runs from the date of payment in situations like this. See *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 Interior Dec. 1090 (1981) (*OCSLA Refunds & Credits*). Relying on *Phillips Petroleum Co.*, 39 I.B.L.A. 393 (1979), the Solicitor explained in *OCSLA Refunds & Credits* that the purpose of Section 1339 is "to require lessees to verify their accounts promptly." 88 Interior Dec. at 1100. He also considered the "special case * * * presented by a retroactive change in the regulated price of oil or gas" and concluded that where FERC agrees to lower the price retroactively, "[t]he two-year limit still applies from the date of payment; but the lessee can interrupt the period by notifying the Department in writing of the challenge." *Id.* at 1101-1102. Consistent with that interpretation, MMS concluded in the instant case that "[a] payor may not *post facto* toll the statute by waiting judicial resolution to notify the Department." Pet. App. 66a.

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[3] MMS did determine that the two-year period described in Section 1339(a) was tolled by a letter it issued on November 9, 1983, announcing that it would issue instructions for seeking refunds based on *INGAA*. Accordingly, the only claims at issue in this case are for royalties paid before November 9, 1981, with respect to which the two-year period already had run before MMS issued its November 9, 1983, letter. See Pet. App. 32a-33a, 49a-50a.

4. The Interior Board of Land Appeals rejected petitioners' challenge to MMS's interpretation of Section 1339(a). Pet. App. 25a-55a. The Board explained:

> The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because [petitioners] may for other reasons appear to deserve refunds.

Pet. App. 40a (citations omitted).[4]

5. The Claims Court disagreed with the Board's interpretation and held that petitioners' requests for refunds are not time-barred. Pet. App. 13a-24a. The court acknowledged that the language of Section 1339(a) requiring a refund request to be filed within two years of payment "would appear to support" the government's interpretation. Pet. App. 18a. But the court nevertheless accepted petitioners' argument that because Section 1339(a) provides for the refund of "excess" payments, the two-year period did not begin to run until the D.C. Circuit held the FERC regulations invalid. Only then, the court reasoned, did petitioners make excess payments. Pet. App. 19a. In addition, relying on *United States* v. *Wurts*, 303 U.S. 414, 418 (1938), the court concluded that the statute

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[4] The Board also reversed certain aspects of MMS's ruling related to the types of information producers must supply in order to receive refunds. See Pet. App. 50a-51a. That portion of the Board's ruling was not challenged in the Claims Court or the court of appeals and thus is not before this Court.

should be construed so that "the limitations period did not begin to run until after the right had accrued." Pet. App. 20a. Here, the court believed that the right to a refund did not accrue until the D.C. Circuit rendered its decision in *INGAA*. Pet App. 20a-21a.

6. A panel of the Court of Appeals for the Federal Circuit unanimously reversed. Pet. App. 1a-8a. The court noted that the "language requires lessees to request the refund of any excess payment 'within two years after the making of the payment,' " and concluded that "[b]y its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment." *Id.* at 5a. In response to the Claims Court's conclusion that a payment was not made until it was found to be excessive, the court explained (*id.* at 6a):

> The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

The court of appeals further held that petitioners were aware prior to the decision in *INGAA* of the basis for claiming that the amounts of their royalty payments were incorrect, because they were aware that gas purchasers would challenge the FERC regulations to which their royalty rates were tied. *Id.* at 7a.

ARGUMENT

The decision of the court of appeals, which turns on the particular—and unambiguous—language of 43 U.S.C. 1339(a), is correct and does not conflict with the decision of any other court of appeals. Petitioners were fully on notice that the FERC regulations that affected the amount of their royalty payments were being challenged by gas purchasers; indeed, a number of the petitioners were parties to the proceedings in the D.C. Circuit in *INGAA*. Yet petitioners failed to avail themselves of the procedures established by MMS that permitted them to preserve their refund claims pending the resolution of *INGAA* simply by filing a notice to that effect with MMS. The decision below therefore does not result in any unfairness to petitioners. Although petitioners assert that the MMS procedures will result in a flood of unnecessary protective refund requests in circumstances such as these, the experience of the decade since the Solicitor of the Interior rendered the formal decision approving these procedures and MMS adopted them does not support that assertion, or suggest that the common-sense application of Section 1339(a) by the agency responsible for its implementation is impracticable. Further review therefore is not warranted.

1. This is a case in which the language of the statute should be both the beginning and the end of the inquiry. Cf. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The statute bars the Secretary from making refunds unless a refund request is filed with the Secretary "within two years after the making of the payment." Petitioners failed to file a request for refund of the payments at issue here within two years of when they were made. They therefore have no right to receive a refund.

Inasmuch as the statute imposes a condition on a waiver of the sovereign immunity of the United States, the courts "must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." *United States* v. *Dalm*, 110 S. Ct. 1361, 1368 (1990) (internal quotation marks omitted); see *id.* at 1369 ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."). Here, petitioners' argument (91-1 Pet. 13; 91-34 Pet. 13-14) that a "payment" is "made" only when a court later determines that the payment was excessive is at best unnatural. Especially in light of the established rule against broad interpretations of waivers of sovereign immunity, petitioners' strained reading of Section 1339(a) should be rejected.

Indeed, just two Terms ago in *Dalm*, this Court rejected a substantially identical claim with respect to the limitations period in 26 U.S.C. 6511(a). Section 6511(a) requires a taxpayer to file certain claims for a refund of overpayment of a tax "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." In 1976, Dalm filed a gift tax return and paid a gift tax of approximately $19,000. After the Internal Revenue Service determined in 1984 that the same transaction was subject to the income tax, rather than to the gift tax, Dalm promptly filed a claim for a refund of the gift tax. 110 S. Ct. at 1363-1364. Dalm contended that her claim was timely because "the gift tax was not paid for the purposes of § 6511(a) until 1984, when it was determined that she owed income tax on the same transaction under an inconsistent theory. So, she assert[ed], her cause of action for refund of gift

tax did not arise until that time." *Id.* at 1369 n.7. This Court firmly rejected that argument (*ibid.*):

> We disagree. The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitation in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.[5]

In this case, just as in *Dalm*, the most sensible interpretation is that a payment is made when the payor tenders payment, not when the payor later concludes that the amount of the payment was calculated incorrectly. There is no basis for an exception to that rule here simply because the D.C. Circuit, more than two years after the payments were made, overturned the FERC orders that had set the ceiling price to which the royalty rates were tied. Here, as in *Dalm*, the "very purpose" of the limitations period is to establish repose and protect the fisc by barring claims against the Treasury after passage of the specified period, even if subsequent events show a payment to have been excessive. There accordingly is no need for this Court to review the

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[5] In light of the close historical relation between Section 1339 and the refund provisions of the tax laws, see *OCSLA Refunds & Credits*, 88 Interior Dec. at 1096-1098, this Court's interpretation of the refund provisions of the tax laws is especially relevant in applying Section 1339.

judgment of the court of appeals applying the unambiguous language of Section 1339.

2. Implicitly recognizing that the language of the statute Congress enacted forecloses their claim, petitioners rely heavily on the principle that statutes of limitations should be construed so that they do not commence to run until the cause of action has accrued. 91-1 Pet. 14-19; 91-34 Pet. 14, 16-20. But none of the cases cited by petitioners has any relevance to the situation presented here, because—unlike *Dalm*, which strongly supports the decision below—none involved actions against the United States. Accordingly, in none of those cases did this Court consider the rule "that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). This rule has special force in cases such as this, involving claims for public funds. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471-2473 (1990). The rule cited by petitioners is simply another "competing canon of statutory construction" regarding statutes of repose and limitation, which must give way before the longstanding judicial policy of strictly interpreting waivers of sovereign immunity. *Block*, 461 U.S. at 288.

In any event, petitioners overstate their case when they claim that the Federal Circuit's decision "is squarely inconsistent with the established principle that statutes of limitations do not begin to run until the plaintiff could bring a claim," 91-1 Pet. 17, or "with the presumption that statutes of limitation begin to run when the rights subject to the bar have accrued," 91-34 Pet. 14. As the court of appeals

noted, petitioners had a fully adequate opportunity to file their claims in a timely manner. In 1981, the Solicitor of the Interior issued a formal opinion approving procedures pursuant to which producers faced with the problem that confronted petitioners could file requests for refunds pending resolution of a challenge to rates promulgated by FERC. See *OCSLA Refunds & Credits*, 88 Interior Dec. at 1099-1102. Indeed, at least one producer in petitioner's situation (Texaco) filed such a claim and avoided the two-year bar with respect to royalties paid in reliance on FERC's revised pricing regulations. Admin. Record, Doc. 26, App. G, *Shell Offshore Inc.* v. *United States*, No. 391-87L (Cl. Ct. 1989). Petitioners, by contrast, failed to do so. Because petitioners do not challenge the procedures for filing refund requests in these circumstances, and because they therefore concededly could have filed their claims at any time after they made payment, their right to seek a refund accrued at the time of payment. There accordingly is nothing anomalous about applying the statutory language as it is written and holding that the two-year filing period set forth in Section 1339(a) began to run when petitioners first could have filed their refund requests.

3. Petitioners also argue (91-1 Pet. 20-25; 91-34 Pet. 15-16, 25-26) that the court of appeals erroneously failed to defer to the views of the Comptroller General. In their view, Congress's 1953 enactment of OCSLA implicitly incorporated into Section 1339(a) the Comptroller General's 1941 interpretation of a prior statute, see Pet. App. 79a-89a. The short answer to this argument is that the Comptroller General's interpretation was not passed by both Houses of Congress and signed by the Presi-

dent; it is the text of the statute Congress enacted that controls. As discussed above, petitioners' arguments are inconsistent with that text.

Even if we assume *arguendo*, however, that the Comptroller General, and not the Secretary, has the power to issue authoritative interpretations of OCSLA,[6] the Comptroller General's interpretation involved a statute significantly different from Section 1339(a) and thus sheds little light on the question at hand.[7] The statute at issue was Section 2 of the Act of Dec. 11, 1919, ch. 5, 41 Stat. 366, which provided that any claim for a refund of excess sums paid for the purchase of public lands must be filed not within two years of the date of payment, but "within two years after the patent has issued for the land embraced in such payment." See Pet. App. 81a. Thereafter, the Act of June 27, 1930, ch. 642, 46 Stat. 822, extended the refund provisions of the 1919 Act to "all payments in excess of lawful requirements * * * under any statute relating to the * * * lease * * * of the public lands."

Interpreting these provisions, the Comptroller General noted that "serious difficulty arises" in applying the two-year bar to matters (like leases or licenses) arising under the 1930 statute, because no "patent" issues in connection with most of them. Pet. App.

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[6] But see 43 U.S.C. 1334(a) ("The Secretary shall administer the provisions of [OCSLA] relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions."); 43 U.S.C. 1339(a) (providing that refunds are available "when it appears to the satisfaction of the Secretary that [a person is entitled to a refund]").

[7] For discussion of this same point by the Interior Board of Land Appeals, see Pet. App. 40a.

84a. Moreover, reliance on the date on which the lease or license was issued would be unfair, "for under such a ruling a repayment of any excess paid after the second year of the life of the permit would automatically be barred." *Ibid.* The Comptroller General noted that it would be "convenient to hold that the 2-year period begins on the date the excess payment is made," but decided that "a ruling of this type would be more in the nature of legislation than interpretation." *Id.* at 85a. Recognizing the need to adopt *some* rule, the Comptroller General proceeded in these circumstances to adopt a rule that generally imposed a two-year bar running from the date the payment is made, but allowed the two-year period to be extended in certain cases until the resolution of contingencies that affect the appropriate amount of payment. See *id.* at 89a. We agree with the Comptroller General's conclusion that a ruling establishing a bright-line, two-year bar commencing on the date of payment is in the nature of legislation. Because that is precisely the legislation Congress enacted in Section 1339(a), the Comptroller General's opinion interpreting a statute that did not contain such a bar is of no relevance here.[8]

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[8] Petitioners also err in relying (91-1 Pet. 23-24; 91-34 Pet. 25-26) on the analysis of the Comptroller General and the Secretary with regard to a 1974 refund claim by Union Oil Company of California. See Memorandum from Frederick N. Ferguson, Assistant Solicitor of the Interior—Minerals, Division of Public Lands, to Director, Geological Survey (Oct. 12, 1972) (Pet. App. 68a-71a); Letter from Elmer B. Staats, Comptroller General, to Henry M. Jackson, Chairman, Senate Committee on Interior and Insular Affairs (July 8, 1974) (Pet. App. 72a-78a). In that case, the Department of the Interior itself retroactively altered the provisions of a unitization agreement with Union Oil in a way that decreased

4. Finally, petitioners contend (91-34 Pet. 22-29) that the court of appeals accorded undue deference to the Secretary's interpretation of Section 1339(a), arguing (91-34 Pet. 23) that "an agency's interpretation of a statute will not be upheld when it conflicts with a longstanding presumptive rule of statutory construction." This contention is meritless because, for the reasons discussed above (see pages 10-11, *supra*), the "longstanding presumptive rule" on which petitioners rely—that statutes of limitations generally do not run until the plaintiffs' right accrues—has no applicability here and is, in any event, satisfied, because petitioners' right to request a refund accrued immediately upon payment.

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the amount of oil revenues Union Oil should have received during the preceding years; it thus indirectly reduced the amount Union Oil should have paid the United States as royalties.

Both the Department and the Comptroller General agreed that the period in Section 1339(a) had been tolled during the period the Department was considering alteration of the unitization agreement. They relied on the general rule that payments made "under protest" toll the two-year period because they sufficiently put the Department on notice that a refund request will be filed. See Pet. App. 70a, 73a-74a. There was no such notice here. As the Solicitor of the Interior acknowledged a decade ago (*OCSLA Refunds & Credits*, 88 Interior Dec. at 1101 n.12):

> Taken out of context, some remarks in [the Union Oil decision] might seem to conflict with [the Department's] interpretation * * * . This would misinterpret [Section 1339], which sets the date of payment as the starting date. In the instances discussed by the Comptroller General, the statute was tolled on the date of the earliest payment. Thus, no time had yet run when the statute resumed following the decision.

In light of the Solicitor's long-standing explanation, petitioners err in relying on the disposition of the Union Oil matter.

In any event, as the court of appeals made clear, its decision did not rest on deference to the administrative construction of ambiguous provisions of federal law; it rested on the court's independent determination that the agency's construction was the only one that accorded with the statute's "clear meaning." Pet. App. 5a. Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1991

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR THE PETITIONERS

In the companion case to the captioned proceeding, *Phillips Petroleum Co., et al.*, Case No. 91-1, Petitioners filed a Reply Brief on September 6, 1991 ("the Phillips Reply") responding to the Brief for the United States in Opposition in both Case Nos. 91-1 and 91-34 ("Opp. Br."). Petitioners Pennzoil Company, *et al.* concur with and adopt the arguments of the Phillips Reply and do not here repeat them. Petitioners Pennzoil Company, *et al.* limit their discussion here to certain points unaddressed in the Phillips Reply.

1. The government's reliance on the line of cases relating to sovereign immunity is wholly misplaced. Whether or not Section 10 constitutes a condition on the government's waiver of sovereign immunity, it does not follow that Section 10 should be interpreted without regard to the presumption that statutes of limitation do not begin to run prior to the time a cause of action accrues. As in any case pertaining to the construction of a statute, the objective of the Court's inquiry must be to determine what "Congress intended". *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Presumptive rules of statutory construction, as well as other canons of statutory interpretation, are aids to ascertain and to give effect to legislative intent.

Contrary to the government's argument, Opp. Br. at 10, traditional canons of construction are not to be swept aside in construing a statute of limitations that conditions the government's waiver of sovereign immunity. To the contrary, disregard of traditional canons of construction is clearly inappropriate where to do so would lead a court to interpret a statute of limitations "unduly restrictively." *Block*, 461 U.S. at 287.

In *Block*, the Court did *not* hold that otherwise applicable presumptions pertaining to the construction of statutes are inapplicable to provisions constituting a condition on a waiver of sovereign immunity. The Court simply rejected North Dakota's assertion that there was a rule that "States are presumed to be exempt from satisfying the conditions placed by Congress on its immunity waivers." 461 U.S. at 289. In the absence of such a presumption, the Court applied the plain language of the Quiet Title Act of 1972 to bar "any" civil action brought under the Act, including those brought by a State, unless the action was commenced within twelve years of the date upon which it accrued. 461 U.S. at 288. The Court further noted that nothing in the legislative history suggested that Congress intended to exempt the States from

the applicability of the 12-year limtiations period. 461 U.S. at 289.

In contrast, there is no dispute that the Court has recognized a presumption that, in the absence of clear language to the contrary, a limitations period should be interpreted as beginning to run only when the rights subject to it have accrued. *United States v. Wurts*, 303 U.S. 414, 418 (1938); *see also Woods v. Stone*, 333 U.S. 472, 476-77 (1948). As demonstrated in our petition for a writ of *certiorari*, the language of Section 10, its legislative history, and its authoritative interpretation by the Comptroller General establish that, in adopting the two-year limitations provision in Section 10, Congress did not intend to depart from the presumptive rule that such limitation periods begin to run only when rights have accrued.

2. The government is mistaken in arguing that the Federal Circuit did not rely on the rule of deference to the administrative construction of Section 10. Opp. Br. at 15. In the penultimate paragraph of its opinion, the Federal Circuit expressly relied on the rule that " 'the construction adopted by an agency charged with the duty to administer the statute . . . is usually given deference.' " App. 8a, citing *Beneficial Corp. & Subsidiaries v. United States*, 814 F.2d 1570, 1574 (Fed. Cir. 1987). The Federal Circuit went on to conclude that "[t]he IBLA's opinion was well-reasoned and did not violate the intent of Congress." App. 8a. Except for this erroneous contention, the government has not responded to our explanation of why the confused and inconsistent actions of the Interior Department deserve no deference in this case. Further, the government's argument that the Federal Circuit decision rests solely on the plain meaning of the statute is particularly disingenuous given that the government's current interpretation of Section 10—that the two-year period runs from the date of "payment"—is different from the Federal Circuit's interpretation of the

same language—that the two-year period runs from the date of "excess payment."

3. The government characterizes Petitioners' interpretation of Section 10 as "unnatural." Opp. Br. at 8. This stands reason on its head. Here both the Claims Court and the Federal Circuit concurred with the Producers that "the phrase 'making of the payment' refers to the making of an *excess payment.*" App. 6a. (Emphasis added). Yet the Federal Circuit went on to conclude that the two-year period in Section 10 began to run against Petitioners prior to issuance of the decision in *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) ("*INGAA*"). As the government itself stipulated, prior to *INGAA*, the Petitioners paid royalties to the MMS based on the then-effective ceiling prices established under Order No. 93, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1977-1981] (CCH) ¶ 30,172 (1980), 45 Fed. Reg. 49,077 (July 23, 1980) ("FERC Order No. 93"), and such royalty payments were "in the amounts then lawfully required" by the MMS. App. 95a. The government's admission of the fact that Petitioners' royalty payments made prior to *INGAA* were not in excess of the amount then lawfully required cannot be squared with its construction of Section 10, adopted by the Federal Circuit, that the two-year period began to run prior to *INGAA*. Under this construction, the limitations period began to run against Petitioners at a time when their royalty payments were in the lawfully required amount and therefore before there was any excess for Petitioners to recover and before a right to a refund came into being. But it is this interpretation that is "unnatural" in that it is flatly inconsistent with the Federal Circuit's own conclusion that the two-year period began to run upon the making of an "excess payment." Worse, it scarcely accords with fairness or reason to hold that limitations, intended to bar those who have slept on their rights, run against those who during the period of its running lack any rights.

4. The government asserts that Petitioners should have availed themselves of "procedures established by MMS" to protect their rights. Opp. Br. at 7. In so arguing, the government appears to suggest that, prior to *INGAA*, the MMS had in place established procedures for preserving contingent refund claims. The record refutes the government's argument.

As abundantly demonstrated by the letter announcement of the MMS after the *INGAA* decision was handed down, it was MMS' policy that it would not accept refund requests until this Court acted on petitions for a writ of *certiorari* in *INGAA*. App. 56a; *see also* 52a-54a. MMS did not develop any "procedures" until after petitions for a writ of *certiorari* were denied. App. 57a-67a. Indeed, the IBLA held that MMS had failed to promulgate any binding procedures, and that the only substantive requirement extant was Section 10 itself. App. 46a-47a. As the IBLA concluded:

> Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 [OCSLA Section 10] itself.

App. 48a.[1] Indeed, the IBLA observed that it was the absence of any regulatory procedures promulgated by the MMS that gave rise to the dispute at issue in the case in the first place. App. 49a.

Accordingly, the government cannot in candor claim that it was Petitioners' failure to follow MMS procedures

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[1] The government's attempt (Opp. Br. at 11) to characterize the 1981 opinion of the Solicitor of the Interior as "approving" substantive procedures upon which the Producers could rely—and of which they should now be held to have had knowledge—is flatly inconsistent with the IBLA's subsequent decision. App. 47a. To that extent, the argument constitutes a *post hoc* rationalization of counsel and must be rejected.

that is the cause of Petitioners' grievance here. Prior to *INGAA* MMS had no such procedures, and the absence of such procedures led even the MMS official in charge of the MMS' royalty program, the Associate Director of Royalty Management for MMS, to believe that no refund requests were due until final resolution of *INGAA*. (App. 56a).

5. The government attempts to distinguish the Comptroller General's authoritative interpretation of Section 10 on the basis of the gloss placed on that interpretation by the Solicitor of the Department of the Interior in his subsequent opinion. Opp. Br. at 13-14 n.8. There is no basis for the Solicitor's assertion of authority to repudiate the controlling interpretation of Section 10 by the Comptroller General. *See United States v. Bergh*, 352 U.S. 40, 46-47 (1956); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973). Moreover, the Solicitor's effort to harmonize his opinion with the Comptroller General's opinion is based on *post hoc* rationalization. Contrary to the Solicitor's statements, the Comptroller General nowhere relied on the filing of a "protest" (there is no indication that a protest was ever filed in the matter before him) or on the pendency of the unitization agreement before another branch of the Department. App. 72a-78a. The Comptroller General's opinion was explicitly based on a construction of Section 10. Consistent with an earlier opinion of an Assistant Solicitor of the Department of the Interior, App. 68a-71a, the Comptroller General concluded that the two-year period did not begin to run on royalty payments that were in the amounts lawfully required when made until the effective issuance of a retroactively applicable decision that rendered the payments excessive. As the Comptroller General reasoned, a claim for refund is timely if filed "within two years of the date upon which it could first be determined that excess royalty payments had, in fact, been made." App. 74a.

CONCLUSION

The decision of the Federal Circuit in this matter affecting substantial royalty revenues collected under Outer Continental Shelf leases is demonstrably wrong, contrary to this Court's prior decisions, at variance with well-established rules of statutory construction, and grossly unfair to the government's lessees. The Court should grant *certiorari* and correct it.

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